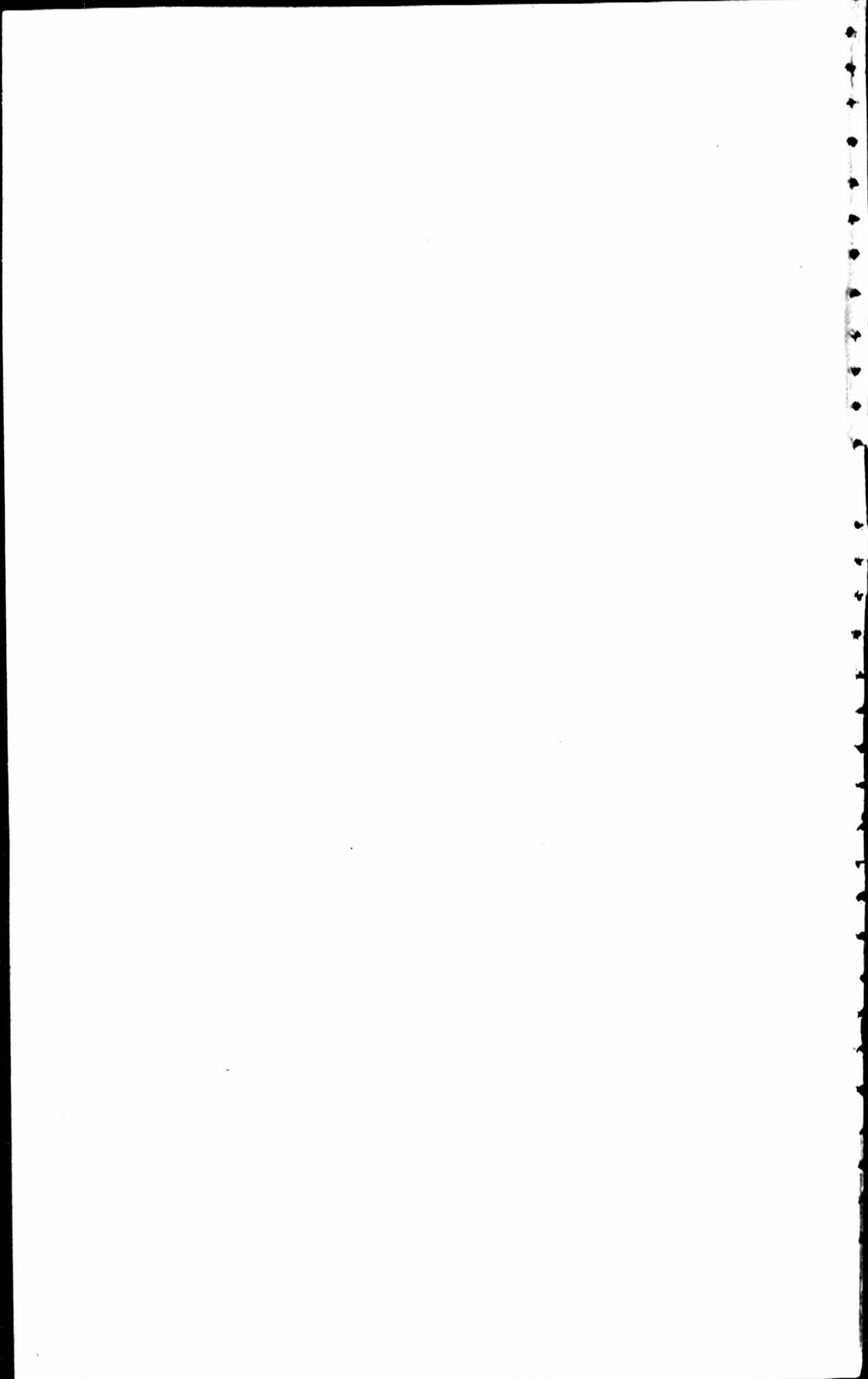


*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**



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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF
AMERICA, Respondents.

Petition for Review of Order of the
Federal Maritime Commission

JOINT APPENDIX

Hearing Examiner's Initial Decision**FEDERAL MARITIME COMMISSION****No. 1153****TRUCK AND LIGHTER LOADING AND UNLOADING
PRACTICES AT NEW YORK HARBOR**

Failure of respondents properly to comply with the express provisions of Agreement 8005 and the tariffs issued thereunder found to be in violation of Sections 15, 16 First and 17 of the Shipping Act, 1916.

Failure of respondents to establish and adhere to reasonable lighter and truck detention rules found to be in violation of Section 17 of the Shipping Act, 1916.

Record instances of credit termination found not to be in violation of the Shipping Act, 1916.

General level of rates in Tariff No. 6 and 14 percent rate increase in Tariff No. 2 not shown to be unjust or unreasonable in violation of the Shipping Act, 1916.

Failure of respondents to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints found to be in violation of Section 15 of the Shipping Act, 1916.

*Mark P. Schlefer, John Cunningham, Richard J. Gage,
and Robert J. Nolan* for respondents.

Herbert Burstein, Samuel B. Zinder, and Arthur Liberstein for intervener Empire State Highway Transportation Association, Inc.

Arthur Liberstein, and Charles Landesman for intervener Wm. Spencer & Son Corporation.

Christopher E. Heckman for interveners Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corporation.

Thomas M. Knebel for intervener Middle Atlantic Conference.

James M. Henderson, Douglas W. Binns, and Jacob P. Billig for interveners Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervener Brooklyn Chamber of Commerce.

Leo A. Larkin, and Samuel Mandell for intervener The City of New York.

Thomas R. Matias and Robert J. Blackwell as Hearing Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER¹

This proceeding, as its title indicates, involves truck and lighter loading and unloading practices at New York Harbor.

The New York Terminal Conference (Conference) operates under approved Federal Maritime Commission (Commission) Agreement No. 8005, as amended, which authorizes the fixing of charges for services of loading and unloading freight onto or from trucks, lighters and barges at piers operated by the respondent Conference members.

On October 10, 1963, the Commission ordered an investigation and hearing to determine whether any of the rates, rules, regulations or practices of respondents violate the provisions of Section 15, 16, or 17 of the Shipping Act,

¹ This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228).

1916, as amended (the Act, or the Shipping Act), or in any manner violate the Act. The Commission's order of investigation and notice of hearing appear in the Federal Register of October 31, 1963. Hearing was held March 9-April 9, 1964, in New York, N. Y.

The order of investigation is in 7 parts. Parts (1), (3), and (6) relate specifically to lighters, part (2) relates specifically to trucks, and parts (4), (5), and (7) relate generally to both lighters and trucks. The 7 parts are numbered, stated, and dealt with in sequence to correspond with the order of investigation.

Pertinent parts of the Agreement and the tariffs issued thereunder will be quoted as the issues raised by the Commission's order are reached for discussion.

This decision disposes of all the issues in the proceeding except those which may arise in connection with certain terminal and stevedoring contracts subpoenaed during the hearing on request of intervener Empire State Highway Transportation Association, Inc., requiring respondents herein to produce said contracts. The subpoena has not yet been complied with but is now before the courts for enforcement on request of the Commission. The issues under the subpoenaed contracts relate to refund of revenues and arise under part (6) of the Commission's order of investigation. See paragraph 95 below. Disposition of the issues under the subpoenaed contracts is reserved for a later supplemental decision when ripe therefor for the reasons stated in "NOTICE OF FURTHER PROCEDURE" issued and served June 25, 1965. See the APPENDIX.

Parties

1. The parties are identified in the appearances. Respondents presently are 22 marine terminal operators.²

² Packet Shipping Corporation, and Cunard Steam-Ship Company Limited were dismissed as respondents March 6, and May 5, 1964, respectively.

Background and history

2. Some of the problems and issues in this proceeding were dealt with and decided in *Empire State H'W'Y Transp. Ass'n v. American Export Lines*, 5 F.M.B. 565³ (hereinafter, *Docket No. 800*). Pages of background and history of pier operations in New York are stated in *Docket No. 800*. Some of the same interveners who participated in that proceeding are participating in this one; and 17 of the respondents in this proceeding were respondents in *Docket No. 800*.

Lighterage, tariff rate-fixing authority, and practices

3. Considered first are the questions presented under lighter loading and unloading practices as to which the Commission directed an investigation and hearing to determine, in part (1) of the order:

(1) whether Agreement No. 8005, as amended, permits the members thereof to consult and agree with respect to the rates, rules and regulations contained in Lighterage Tariffs No. 1 and 2 or whether the rate-fixing authority granted by that agreement is limited to the fixing of rates only with respect to lighters and barges alongside piers; and whether the practice of assessing charges against lighters alongside vessels may be an unjust or unreasonable practice under section 17 of the Act.

³ Docket No. 800—*Empire State Highway Transportation Association, Inc., and New Jersey Motor Truck Association, Inc. v. American Export Lines, Inc., et al.*; Docket No. 801—*Truck Loading and Unloading of Waterborne Cargo at New York—Investigation of Rates and Practices of Parties to Agreement No. 8005*; and Docket No. 821—*In the Matter of Agreement No. 8005-1 Between American Export Lines, Inc., American President Lines, Ltd., Bull-Insular Line, Inc., American Stevedores, Inc., International Terminal Operating Co., Inc., et al.*

4. The Agreement provides in pertinent part:

That they [respondents] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of loading and unloading of waterborne freight onto and from trucks, lighters and barges, and the service of storage of waterborne import freight on the pier (including the fixing of free time period), as aforesaid; . . .

5. On January 20, 1961, the Conference issued Lighterage Tariff No. 1, effective February 20, 1961, and on April 26, 1963, issued Lighterage Tariff No. 2, superseding Tariff No. 1 effective May 27, 1963, and increasing the rates by about 14 percent. These tariffs name rates, rules and regulations for the services of loading and unloading lighters and barges alongside vessels moored at piers operated by respondents. That is, the cargo is transferred between ships' holds and lighters' decks without having the goods come to rest on the terminal pier. Both of these tariffs were protested by the lighter interveners on the grounds (1) that the lighterage charges duplicate stevedoring charges assessed against the vessel and result in double payment for the same service; (2) that the tariffs do not state all of the terms and conditions applicable to the services covered by the tariffs; and (3) that the charges assessed are unduly high.

6. The rates contained in Lighterage Tariff No. 2 (Tariff No. 2) are applicable to the service of loading and unloading derrick lighters, covered barges and deck scows (lighters) alongside vessels which are moored at piers operated by respondents. This is called direct transfer, or over-the-side handling of cargo. The principal commodities handled this way are copper, steel, steel products, Cargo N.O.S., and other items listed in the tariff. The tariff rates do not apply to bulk cargo. In point here, Tariff No. 2 provides that:

(a) The service of loading lighters shall include stowage of cargo aboard lighters in a safe, reasonably efficient manner consistent with the custom and practice in the port of New York.

(b) The service of unloading lighters shall include whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear.

(c) The terminal operator shall supply all labor and equipment necessary to properly load or unload the lighter.

7. Tariff No. 2 states two rate classifications, one for shipments in excess of 100 tons (volume shipments) and another for shipments of 100 tons or less (less-volume shipments). Less-volume shipments are generally found on railroad lighters, and volume shipments generally are handled by private lightermen. Rates are quoted in cents per ton of 2000 pounds, except where otherwise specifically noted.

8. Tariff No. 2 provides only for over-the-side handling of cargo. However, lighters are sometimes loaded and unloaded at respondents' piers, but the tariff contains no rates or provisions for such service. The lighterman may not, on arrival at the pier, demand over-the-side loading or unloading. The stevedore decides whether a particular shipment will be handled from or to the pier or over-the-side for his own convenience and necessities.

9. As to when lighters may arrive at the piers with their goods, the steamship companies issue permits to the lighterman giving a range of two dates for the lighters to arrive at the piers. On this permit to arrive there is no indication as to whether the cargo will be handled over-the-side or to the docks, because cargo loading of a vessel goes forward in progression, having regard to loading for discharge at several ports and order of arrival of other cargo. It has to be dealt with from time to time based on the ability

of the vessel to receive the cargo into her holds. Under the permit issued to the lighters the terminal operator has complete control of the arrival time and the time when the cargo will be received from the lighter.

10. The size of the average lighter's cargo deck is 85-90 feet long by 30-35 feet wide. When working cargo over-the-side if the terminal operator places the lighter alongside the ship's hatch so that the ship's hook lands in the center of the lighter's length, the drafts of cargo need be moved on the lighter's deck not more than 45 feet and as the loading progresses that distance is shortened. Likewise, in an unloading process the distance cargo is moved grows from a few inches to not more than 45 feet. If, to speed its operations, the terminal operator decides to work cargo from two lighters into the same hatch, the ship's hook may fall at one end of each lighter. In that event, the greatest distance to be traveled on the lighter's deck is 90 feet with shortening of the distance in the same proportion as described in the first mentioned example.

11. When the terminal operator elects to receive the lighter's cargo on the pier, delivery is seldom accomplished at the point where it may be lifted directly from the pier into the ship's hold. In such cases, therefore, after discharge to the pier the cargo must be moved from the point of rest on the pier to a point of rest on the ship's hold into which it is to be lifted.

12. Sometimes the terminal operator, for his own convenience, works a lighter over-the-side at night. This is a disadvantage to lightermen in that it causes them to incur overtime wages of the lighter captain and also of the lighterman's foreman who checks the count of cargo with the terminal's checker.

13. The lightermen interveners state that respondents have not established that additional expenses are involved in over-the-side work not included in the steamship com-

pany payment (par. 16, below); that respondents' cost analysis involved a strike period, failed to separate volume from less-volume shipments, and certain costs are pure estimates without any proper foundation for them; and that the added expenses referred to in paragraph 16, below, are covered by the stevedoring rate which constitutes adequate consideration for respondents' work, and thus a charge to the lighterman constitutes double compensation.

14. With respect to part (1) of the Commission's order, quoted in paragraph 3, above, respondents state that the establishment of rates for direct transfer from lighter to vessel falls squarely within the terms of respondents' organic agreement, quoted in pertinent part in paragraph 4, above; that the agreement covers service at respondents' terminals in the loading and unloading of waterborne freight onto and from lighters and barges, wherever located, without regard to whether moored to the pier or alongside oceangoing vessels; and that, even were this doubtful, such doubt should be resolved as here suggested; cf. *Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 F.M.B. 415, 418-19 (1961), where the Federal Maritime Board held that cargo transferred from barge to ocean vessel properly was to be regarded as subject to wharf tollage, notwithstanding that the cargo in question at no time passed over the respondents' wharf.

15. Respondents state that the practice of assessing charges against lighters alongside vessels has obtained since World War I, far antedating the establishment of the conference and issuance of a lighterage tariff; that a rate or practice of long standing, without challenge to its propriety, is presumed to be reasonable, and is not to be disturbed in the absence of clear and convincing evidence to the contrary. *Sugar From Virgin Islands to United States*, 1 U.S.M.C. 695, 697 (1938) and other cases cited.

16. Respondents state that direct transfer between lighter and ship entails added expense; that working cargo

from the pier promotes or permits of operating economies on the part of respondents which are not feasible in the direct transfer thereof between lighter and oceangoing vessel; that, in addition, certain items of expense not encountered in working from the pier are necessarily incurred in transfer to or from lighter; and that the net result of these factors is that loading cargo from lighter to vessel, and vice versa, unavoidably results in higher costs to the terminal operator, justifying the tariff charge. Some of the added expenses in direct loading and unloading of lighters, as against working cargo to or from the pier, stated by respondents are: lower productivity, less working space, necessity to break cargo out of stow on the lighter resulting in slow operations, less utility of mechanical equipment, re-rigging of gear for working over-the-side (some \$80) not compensated in the stevedoring rate, idle gang time while uncovering the hatch on hatch lighters, and shifting lighters. Thus, respondents state, it is reasonable for them to assess a charge for this direct transfer between lighters and oceangoing vessels; that in calculating its bid rate for stevedoring, the terminal operator takes into account (as a deduction from its bid) the anticipated revenue from lighters for working cargo over-the-side; and that the lightermen's contention as to double compensation is without merit. *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939).

17. Respondents state that the shipper pays the lightermen for transportation to or from the vessel and the lightermen's rate to the shipper is the same whether the cargo is handled over-the-side or at the pier; that the lighterman, when the cargo is worked over the side, pays the charge under Tariff No. 2, but he pays only once; that if the cargo is handled to or from the dock, he pays no tariff charge therefor, but instead he employs labor to perform the work, either directly or through Spencer.⁴

⁴ Spencer identified in pars. 52 and 53, below.

Thus, respondents state, neither the shipper nor the lighter-man pays a double charge.⁵

18. The position of Hearing Counsel, for all practical purposes, is encompassed in the following discussion and conclusions in this part of the proceeding, part (1), except as otherwise stated.

19. The practice of moving cargo directly between lighter and vessel is one of the contested lighterage issues in this proceeding. The terminal operator charges the lightermen under Tariff No. 2 for services rendered in connection with this operation.

20. In *Sun-Maid Raisin Growers Ass'n. v. United States*, the United States District Court for the Northern District of California stated:

"It is well established and is conceded that the duty of moving freight from the place of delivery on the dock to the ship's tackle and thence to a place on the dock at the port of delivery is a part of the duty of the carrier transporting the freight from port to port . . . and in the absence of a special handling charge the freight rate would cover this duty. That is to say, the freight rate would cover the stevedoring charge."

33 F. Supp. 959, 961 (1940), aff'd 312 U.S. 667.

21. The record in this proceeding reflects the assumption of this duty by ocean carriers serving the port of New York. By custom in New York, the ocean carrier assumes that responsibility of removing import cargo from the point beneath the ship's hook on the pier's stringpiece to the final place of rest on the pier at which point the cargo is tendered to the consignee. Traditionally, the place of rest is a location on the pier where cargo conveniently may be stored for the period of free time as it awaits final delivery to the consignee. In the case of export cargo, the

⁵ Also discussed under part (2).

process of course is reversed—the shipper or his bailee is responsible for the deposit of cargo at the place of rest where the ocean carrier receives it for transportation.

22. The transition between the place of rest and the ship's hold may be accomplished by the carrier itself or by the terminal operator. The usual practice in New York is for piers to be leased—in a few cases by the carrier or more often by a terminal operator. In the former case, the ship hires longshoremen itself executing terminal functions or contracting terminal work out, and in the latter case, the terminal operator leases the pier and assumes terminal duties under contract with the lines being serviced at that pier. In some cases the terminal operator undertakes to perform both stevedoring work and terminal work, and there are some cases where two contractors will be on a pier, one doing stevedoring exclusively and the other engaging only in terminal work.

23. Witnesses drew sharp distinctions between operations that are stevedoring in character and those that are terminal operations. In the case of import cargo, stevedoring may be defined as the process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore; for export, the process is reversed beginning at place of rest and ending at vessel's hold. This entire operation is performed by the stevedore's gang unit of 21 to 23 longshoremen and includes an element of sorting. Stevedoring is done for the account of the steamship company and the stevedore is paid for his service by the ship. Loading and discharging the vessel is the ship's responsibility performed in its stead by the independent contracting stevedore and the process begins and ends at the place of rest. The terminal function aside from strict stevedoring was described as an assisting process and could be said to include everything not deemed stevedoring. Included

in terminal functions are watching, cooperating, checking, clerking and breaking down cargo for weighers. In analyzing the substance of a series of operations in order that responsibilities can be fixed it is essential that proper distinctions be made. The Commission expressed this view in *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 23, where it stated:

We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable terminal operators, the shipping public, carriers, and us to determine whether each service is bearing its fair share of the cost load.

* * * *

In deciding the various issues in this case it is necessary at all times to keep in mind that the respondents are terminal operators that form an intermediate link between the carriers and the shippers or consignees, and that in consequence the operators are performing some services for the carriers and other services for the shippers. In view of the fact that there are so many different methods of furnishing terminal facilities to carriers and of furnishing or not furnishing the labor to work those facilities, it is necessary to distinguish those services which are attributable to the transportation obligations of the carrier from those which are not.

24. The terminal operator who offers the widest range of services available serves two interests. The ocean carrier is served when the terminal performs the carrier's undertakings—stevedoring and those ancillary duties comprising the terminal operation, and the terminal operator serves cargo in the performance of such services which embrace cargo's responsibilities.

Direct transfer of cargo

25. The direct transfer issue involves both lighters and trucks and is seen in those situations where cargo moves directly between the deck of a lighter and the vessel or directly between the trailer of a truck and the hold of a vessel (trucks discussed under part (2), below). Containerized freight as well as heavy lifts are peculiarly susceptible to direct handling. As to lighter cargo, the direct operation is seen when the lighter is moored offshore from a vessel itself moored to the pier and the ship's tackle is dropped to the deck of the lighter where tackle is attached to the cargo and the draft is then taken directly into vessel's hold. Terminal operators performing this operation charge the lightermen under Tariff No. 2, as before stated. Whether such charge is proper depends on whether direct transfer is within or without the ambit of stevedoring.

26. Hearing Counsel state that, to a large extent, they agree with the lightermen in their contention that over-the-side work is stevedoring, but that it further appears that the deck of a lighter is more than a place of rest; that it is the place where cargo is broken from stow in the case of export and where cargo is placed in stow on import; and that operations such as breaking stowage and trimming a lighter cannot be deemed to be stevedoring functions but must, they believe, be regarded as services rendered cargo to complete the tender of export cargo to the ship and in the case of import cargo, services rendered the initial step in receiving cargo. Hearing Counsel state that as regards "over-the-side work" there is only one possible place of rest on a lighter's deck and that is the point at which ship's tackle may be attached to any given piece of cargo; that from such point to the vessel's hold, the stevedore is performing a stevedoring function the cost or expense of which cannot be levied against the lightermen; and that the extent to which

the terminal collects charges for the stevedoring portion of over-the-side work it is a double charge, and the collection of that charge is an unjust and unreasonable practice under Section 17 of the Shipping Act.

27. Hearing Counsel state that the lighterman should have the option of either utilizing his own employees or those of the terminal in stowage and breaking of stow on the lighter's deck; that in the former instance, no charge would be assessable against the lighter for although longshoremen would be under ship's hook on the lighter's deck, the service performed by the terminal would be in the nature of stevedoring only; that in the latter instance, a charge would accrue against the lighterman for the services performed by the additional terminal employees on the lighter's deck; and that sufficient authority exists in Article 1 of Agreement No. 8005 (par. 4, above) to perform and charge for the service.

28. Hearing Counsel state that a modification of Tariff No. 2 setting forth charges for services other than stevedoring when performed by the terminal at the request of the lighterman would be proper.

29. Hearing Counsel, regarding their conclusions, state that although a carrier can divide a rate and make a separate charge for "handling", *J. G. Boswell Co. v. American-Hawaiian S.S. Co., supra*, by custom and practice, this is not done in New York; that cargo pays the carrier for stevedoring through the ocean freight rate, and the stevedore is compensated for his services, in turn, by the carrier; and that an element in the cost of transportation, direct transfer, like stevedoring generally, is a matter between carrier and cargo.

30. Decided first are the questions raised by part (1) of the Commission's order (par. 3, above); namely, does respondents' rate-fixing authority under Agreement No. 8005, as amended, include the right to establish charges

for transfer from lighters direct to oceangoing vessels or does the authority extend only to transfer of such cargo between lighters and piers; and whether the practice of assessing charges against lighters alongside vessels may be an unjust or unreasonable practice under Section 17 of the Act. The pertinent part of the Agreement is quoted in paragraph 4, above. It is clear that the services described in the quoted part of the Agreement apply to such services "on the pier", and no reference is made to such services from lighters direct to oceangoing vessels. Therefore, the Agreement, as amended, does not permit the members thereof to consult and agree with respect to the rates, rules and regulations contained in Lighterage Tariffs Nos. 1 and 2; the rate-fixing authority granted by the Agreement is limited to the fixing of rates only with respect to lighters alongside piers; and the practice of assessing charges against lighters alongside vessels is an unjust or unreasonable practice in violation of Section 17 of the Act.

31. The direct loading and unloading of vessels at New York includes stowage and breaking of stow on the lighter and is a stevedoring service for which the ocean carrier is responsible. The ship pays the stevedore for performing this service with the cost of it ultimately being borne by cargo through the payment of a single, inclusive ocean freight rate. Under the practice of direct transfer of cargo at New York between lighter and vessel the service is entirely stevedoring; and when the terminal operator assesses a charge under Tariff No. 2 for such direct transfer, cargo is paying a double charge for a single service which is unjust and unreasonable in violation of Section 17 of the Act.

Trucking

32. Considered next are the questions presented under truck loading and unloading practices referred to in part (2) of the Commission's order:

(2) whether Agreement No. 8005, as amended, permits the parties thereto to amend the definition of truck unloading in Truck Loading and Unloading Tariff No. 6, to include the vessel itself as a "place of rest"; whether such definition, if authorized by the conference agreement, may result in an unjust or unreasonable practice in violation of section 17 of the Act; and whether the parties to Agreement No. 8005 engaged in that practice even prior to the amended definition.

The Agreement in pertinent part is quoted in paragraph 4, above.

33. Consignors and consignees of waterborne freight moving in ocean commerce dispatch trucks to the piers in order to deliver or receive their shipments. In 1962, the Port of New York handled 13,901,942 long tons of general cargo, approximately 85 percent of which was moved to and from the piers by motor carriers. The remainder was moved by lighters and railroad cars.

34. Import freight is discharged from a vessel by stevedores (who generally are the respondents) and, thereafter, it is sorted and stacked at a point of rest on the pier and then moved to a vehicle and placed thereon by the respondents. In the case of export freight, the same operation is performed prior to loading aboard a ship, except that the motor carrier has the option to unload the vehicle.

35. Generally speaking, upon arriving at a pier, the driver first receives a gate pass and thereafter his papers are checked. If found in good order, his vehicle will be placed on the pier in order to receive or deliver the cargo.

36. The Conference has on file Truck Loading and Unloading Tariff No. 6, F.M.C.—T. No. 7, (Tariff No. 6) naming rates, rules and regulations for loading and unloading trucks at piers operated by the Conference members. On July 19, 1963, the Conference issued a First Revised Page 3 to Tariff No. 6, Item 3, 2, A, effective August 19, 1963, which amended the definition of truck unloading to provide that such service "shall mean the service of removing cargo from the body of the truck to the dock vessel or other terminal facility designated by the Terminal Operator . . .". The previous definition covered the removing of cargo from the truck "to place of rest designated by the Terminal Operator . . .". By this amendment the tariff provision for truck unloading was modified to delete reference to the place of rest and to expressly include the vessel as the place of immediate destination. The purpose of the amendment is to permit respondents to assess truck unloading charges on direct movement of cargo between truck and vessel. Truckers have protested the practice on the ground that such movement is not properly "truck unloading", since "place of rest" cannot be construed as the vessel itself.

37. Arising here is the question of whether Agreement 8005, as amended, permits respondents to include the vessel as the place of rest thus bringing direct transfer of cargo from trucks within the zone of services chargeable to the truckman. This issue is somewhat like the lighterage question; and much of the discussion and findings stated above with respect to lighter direct loading and unloading, stevedoring, place of rest, terminal functions, and steamship functions apply with equal force to trucking and need not be repeated.

38. Respondents state that Agreement 8005, quoted in pertinent part in paragraph 4, above, authorizes the service referred to in the tariff of "removing cargo from the body of the truck to the . . . vessel . . .", and that it is just

and reasonable to make a charge for such direct transfer of cargo; that to refrain therefrom would ignore the disruption of pier operations, reduced efficiency, and resultant greater expense to respondents consequent to placing a truck under ship's hook; that it would result in granting the truckers a windfall at the expense of respondents, with no compensating benefits to shippers since the trucker's rate to its shipper includes truckloading and unloading; and that contrary to interveners' assertion, it does not result in a double charge.

39. The Port of New York Authority and The Export Packers Association, interveners, (Port Authority and Export Packers) state that direct transfer of cargo from truck to vessel is a stevedoring service paid for by the vessel, and in turn, by the shipper in the ocean freight rate; and that the unloading charge simply compels the shipper to pay twice for precisely the same service. The Port Authority and Export Packers further state that direct transfer is an efficient method of handling cargo; that it does not involve additional costs and, if it did, they should be paid by the steamship line and are irrelevant to this proceeding; that direct transfer is especially important in the movement of heavy lift and container cargo; that container service at New York is growing and has great potential; and that the unloading charge here involved presents a very substantial obstacle which could be disastrous to such growth.

40. The Port Authority's Traffic Manager testified that the direct transfer charge is a direct obstacle to the development of container service, and that the effect of the charge will be to divert cargo to Philadelphia and Baltimore, competitive North Atlantic ports, where no such direct transfer charge is made.

41. Respondents state that container cargo is not hampered by the direct transfer charge; that since the charge

applies to all truckborne cargo, it is clear that container cargo has not been singled out for different treatment than cargo generally; and that possible diversion of container cargo from New York through Philadelphia, contended by the Port Authority, is offset by better suitability to container cargo of the New York piers than those at Philadelphia. In view of the ultimate conclusions herein, it is unnecessary to discuss the container cargo question further.

42. Hearing Counsel state that direct transfer of cargo between truck and vessel is obviously a stevedoring operation; that cargo has fulfilled its obligation of making itself available to the vessel at a convenient point, and when cargo's truck has positioned itself beneath ship's hook, no service has been rendered to either the ship or the cargo by the terminal until the hook is attached which act is clearly an element of stevedoring; that conversely, on import cargo, the stevedore's last contact with the cargo is when ship's tackle is detached after deposit on the truck's bed; that the entire operation is on behalf of the ship in support of its obligation to unload; that the bed of the truck may here be construed as the fictional place of rest as it is here that stevedoring begins and ends; and that the stevedore is reimbursed for this service under his stevedoring contract with the ship, and the collection of charges from the trucker for this service under Tariff No. 6 constitutes a double charge for a single service. This practice, Hearing Counsel state, is unjust and unreasonable in violation of Section 17 of the Act.

43. As to whether Item 3, 2, A, of Tariff No. 6 can impliedly designate the vessel itself as the place of rest, Hearing Counsel state that stevedoring begins or ends with the vessel; that hence, the vessel is always within the scope of the stevedoring process; that the place of rest, on the other hand is the transition point between two responsibilities; that obviously cargo's responsibility cannot extend into the vessel's hold; and that the use of the

term "vessel" in the tariff item referred to is improper, and must be deleted.

44. Respondents in reply, state that without conceding the validity of Hearing Counsels' position, a charge by the terminal operator in respect of direct transfer is nevertheless reasonable and lawful; and that since direct transfer from truck to vessel disrupts pier operations and subjects respondents to additional expense they are entitled to recoup from the truckers the cost and value of the privilege or use so made available.

45. Decided next are the three questions raised in part (2) of the Commission's order quoted in paragraph 32, above. Taking them up in sequence, Agreement No. 8005, quoted in pertinent part in paragraph 4, above, does not permit respondents to amend the definition of truck unloading in Tariff No. 6, to include the vessel itself as a "place of rest" because there is no language in the Agreement indicating such permission; because "place of rest" designated by the terminal operator means a specified area on the dock reserved for the receipt of export cargo for a particular ship and segregated as to ports of call of that particular ship; and because lifting cargo from a truck by ship's tackle to ship's hold is a stevedoring service, rather than a truck unloading service as defined in the tariff. As so defined, the term applies to the ordinary and usual removal of cargo from the body of the truck to some place of rest on the terminal premises prior to lifting it into the ship. Respondents may not circumvent this fact by designating the "place of rest" as on board the ship. In *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 59 (1948), the Commission stated that "The point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company". This definition gives the term a reasonable and generally accepted meaning. It contemplates that the "place of rest" is occupied by the cargo prior to the time

when it is lifted into the ship by ship's tackle. The same definition has traditionally and consistently been applied by the Commission's predecessors. In *Terminal Rates and Charges at Seattle of Alaska S.S. Co.*, 2 U.S.M.C. 660 (1942), the Commission made the clear distinction in discussing handling charges when it stated:

Handling charges are made for moving freight between place of rest on the wharf and ship's sling.

In *Terminal Rate Increases—Puget Sound Ports, supra*, p. 25, the Commission stated:

The imposition of a wharfage charge against the cargo can be justified only on the principle that the carrier, or the terminal operator on the carriers behalf, does not actually take possession or deliver up possession of the cargo other than at place of rest on the pier as distinguished from the end of ship's tackle. Between that place and the entrance to or the exit from the pier the cargo is using the pier to get into position to utilize the carrier's facilities or has finished the use thereof.

46. Thus the direct transfer of cargo between trucks and vessels, as in the case of lighters, is a stevedoring service for which the ocean carrier assumes responsibility. The ship pays the stevedore for performing this service in its stead with the cost of the service ultimately being borne by cargo through the payment of a single, inclusive ocean freight rate. When the terminal operator assesses a charge under respondents' Tariff No. 6 for a direct transfer between truck and vessel, cargo is paying a double charge for a single service; and the practice of assessing this charge is unreasonable in violation of Section 17 of the Act.

47. Such charges are not within the scope of the Conference Agreement. Therefore, respondents exceeded their

authority, in violation of Section 15 of the Act in fixing and assessing such charges. Even if such charges were within the scope of the Agreement (8005) they would constitute an unreasonable practice in violation of Section 17 of the Act, since such charges duplicate stevedoring charges assessed for the same service. In addition, such charges subject a particular description of traffic to undue or unreasonable prejudice or disadvantage in violation of Section 16 First of the Act. Accordingly, the use of the term "vessel" in Item 3, 2, A, of respondents' Tariff No. 6 should be removed from the tariff.

48. The last question in part (2) of the Commission's order inquires whether the parties to Agreement No. 8005 engaged in the practice referred to (assessing truck unloading charges for "direct transfer") prior to the amended definition. In this connection, the tariff amendment, as before stated, became effective on August 19, 1963. The record shows that there were four such instances prior to August 19, 1963, and that the charges so assessed were either refunded or waived by the respondent terminal involved. Technically, these four instances constituted violation of Sections 15, 16 First and 17 of the Act for the same reasons stated above respecting vessel as place of rest and direct service charge. In view of the disposition of these instances, however, it is unnecessary to consider them further.

Lighterage, tariff failure to include rates for certain services

49. Considered next are the questions presented under Tariff No. 2 regarding failure of respondents to file a tariff including rates assessed against lighters loaded or unloaded alongside piers. These questions arise under part (3) of the Commission's order:

- (3) whether the failure of the parties to Agreement No. 8005 to file a Tariff including rates assessed

against lighters and barges alongside piers (as distinguished from alongside vessels) is a violation of section 15 of the Act and of Article 4 of Agreement No. 8005, as amended.

50. Agreement 8005 in pertinent part is here quoted:

That all published tariffs of rates, charges, classifications, and all rules and regulations covering their application, and additions thereto and changes therein, applicable to the services referred to in this Agreement, and copies of all Minutes of Meetings and true and complete records of all affirmative and negative actions of the parties, pursuant to or giving effect to this Agreement, shall be furnished promptly by the Agent to the governmental agency charged with the administration of Section 15 of the U.S. Shipping Act 1916, as amended.

51. As stated in paragraph 8 above, Tariff No. 2 contains no rates or provisions for the service of loading or unloading lighters alongside piers, unless it can be contended that the following provision quoted from the tariff relates to such service:

Services not specifically mentioned in this tariff shall be performed only upon individual negotiation and at rates so negotiated.

52. While it is a small part of respondents' terminal services, lighters are sometimes loaded or unloaded to or from the piers by the terminal operator. In most instances, however, this service is performed by Wm. Spencer & Son, Corporation (Spencer). Spencer is engaged in the handling of lighterage freight to and from lighters to and from steamship piers in the Port of New York on behalf of railroads and other companies. Spencer has no tariff and rates for his services are negotiated.

53. If the lighter is worked to or from the pier the lighter operator moves the cargo between the lighter and a place of rest on the pier. The men who perform this work are paid by the lightermen. The lightermen also own or rent the machinery involved. Spencer has his own employees who move from pier to pier; they are members of the International Longshoremen's Association (ILA). In some instances it is not convenient for Spencer to use his own employees for this operation and, in such instances, the terminal operators are requested to supply the labor on a contract basis.

54. In most cases the lighterman can take the cargo off or put it on the pier; if not, he hires Spencer. When the lighterman must move cargo between the pier and lighter he sometimes arranges to use Spencer's employees, and sometimes he contracts with the terminal operators just as Spencer does. On such occasions when the terminals perform the service they do it on a "labor-supplied" or "contract" basis. Respondents state that when this is done it is not within Tariff No. 2; and that they have no agreement among themselves as to what this charge will be.

55. Respondents state that in these circumstances there is no occasion for them "to file a tariff including rates assessed against lighters and barges alongside piers . . ."; and that since they have no agreement concerning this activity and have no rates therefor, the Commission is without jurisdiction to require them to file a tariff.

56. Spencer's Executive Vice President testified that the filing of tariffs by terminal operators for the lighter/pier operation would be detrimental generally and detrimental to Spencer specifically, because (1) loading and unloading of lighters alongside piers is important to Spencer, (2) it represents a very small item to the terminal operators, and (3) quotation by the terminal operators of lower tariff rates than Spencer now negotiates would force Spencer to meet or undercut the tariff to the detriment of Spencer

with the possibility that Spencer would be forced from the business.

57. Hearing Counsel state that Spencer's position has no bearing on the mandates of Section 15 of the Act; that if the facts are such as to invoke Section 15, the compulsion of the statute automatically follows; that the underlying purpose, however, of Section 15 as with all sections of the Act is to foster sound and effective regulation; that the terminals only very rarely engage in lighter/pier operations; and that no useful regulatory purpose would be served by requiring respondents to file tariffs for working lighters to and from piers, and their failure to do so is not a violation of Section 15 of the Act.

58. Because a terminal service is not regularly performed or because it is only infrequently performed does not relieve those performing it from the obligation of making clear in their tariffs what the uniform charge for the service will be.

59. Respondents' Tariff No. 4, considered in *Docket No. 800*, contained a provision:

"that cargo weighing over 6,000 pounds per piece is subject to a negotiated rate. This provision was adopted by the terminals because most of them have equipment capable of handling a maximum of 6,000 pounds. When heavier pieces must be loaded, outside firms must be employed to bring in heavy-lift equipment. No standards have been set as to how the individual terminal is to interpret these and other discretionary provisions of the tariffs."

60. In connection with tariffs containing provisions for negotiated rates, the Commission held in *Docket No. 800*, page 590, as follows:

"Tariff No. 4 provides for an extra charge for loading or unloading cargo weighing more than 6,000

pounds per piece, such charge to be determined by negotiation. . . . The tariff provides no standards by which individual member terminals will be guided in determining this special charge."

"The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know what a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly."

61. The failure of respondents, therefore, to file a tariff including rates assessed against lighters alongside piers (as distinguished from alongside vessels) is a violation of Sections 15 and 17 of the Act and of Article 4 of Agreement No. 8005, as amended (Article 4 quoted in paragraph 50, above).

62. Considered next are the questions presented as to whether respondents' tariffs state all of the terms and conditions applicable to the services covered by said tariffs. These questions arise under part (4) of the Commission's order:

(4) whether the tariffs filed with the Commission by the parties to Agreement No. 8005 state all of the terms and conditions applicable to the services covered by said tariffs; whether any of the terms and conditions go beyond the routine rate-making authority granted by Agreement No. 8005, as amended, and thus require independent section 15 approval; and if so,

whether such terms and conditions should be approved, disapproved or modified pursuant to section 15 of the Act.

63. The issues raised in this part (4) are encompassed by the findings and conclusions made in the other parts herein of the Commission's order.

64. Considered next are questions relating to Section 16 First of the Act. These questions arise under part (5) of the Commission's order:

(5) whether any of the rates, charges, rules or regulations contained in the tariffs filed with the Commission by the parties to Agreement No. 8005 result in any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

65. The questions dealt with in this part are discussed in sequence as follows:

Railroad heavy lift freight, free handling of; Lighter detention, and Truck detention.

*Railroad heavy lift freight,
free handling of*

66. Tariff No. 2 contains the following provision:

"There shall be no charge for the loading or unloading of single pieces of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad."

67. As to this subject, respondents state that the apparent preference for railroad traffic and discrimination against private lighter traffic suggested by the tariff provision never materialized in the record; that there is no evidence that heavy lift, from 6 to 35 tons, has ever moved

on private lighters or other than via railroad lighters; and that no change should be made in the tariff in this respect. Respondents argue that discrimination and preference do not exist in the abstract, and that the absence of an actual or potential movement disadvantaged by the tariff provision eliminates the issue. *Ponce Cement Corp.—Rates and Operations*, 4 F.M.B. 603, 608 (1955) and other cases cited.

68. As to respondents' claim that discrimination cannot exist in the abstract, Hearing Counsel state that it can; that when no reparation award is being sought, it is not necessary to show that legal damages have been sustained by any party; and that the only issue is the fact of the discrimination. *Int'l Trading Corp. v. Fall River Pier Line, Inc.*, 7 F.M.C. 219 (1962). Here, Hearing Counsel state, the fact exists on the pages of Tariff No. 2, and as such, is condemnable by the Commission.

69. Hearing Counsel state that the selective treatment given heavy lift cargo originating with or destined to railroad lighters is clearly preferential and discriminatory; that since the cargo in issue here is in the heavy lift category, it may be that no service in addition to the attaching of tackle is required; and that if so, no charge should be assessed, and the language of preference appearing in the tariff is without meaning.

70. Hearing Counsel state that the operation here involved is a stevedoring function and, in keeping with their earlier conclusions on direct transfer, a separate charge for this service is improper; that the free handling or heavy lifts originating with or destined to railroads is a practice which is preferential and discriminatory in its present context, but being a stevedoring operation, no charge should be made for this service in the future.

71. Private lighter owners compete with railroads for the carriage of freight and should get the same treatment

afforded to railroads. The tariff provides that no service shall be performed without charge. It also provides for assessment of charges to private lighters for direct service and no charge to railroad lighters for the same service. For these reasons and those stated by Hearing Counsel, respondents' assessment of charges under the tariff to private lighters while handling railroad lighters free violates Sections 16 First and 17 of the Shipping Act.

Lighter detention

72. As before stated, lighters arriving at piers do not know until arrival how they will be worked (over-the-side or at the pier), and when worked over-the-side long delays are frequent. The lighter might be detained several hours or even a matter of days, being worked sporadically throughout day and night. The result sometimes is that the lighter incurs additional costs through overtime of the lighter captain and lighter foreman plus wharfage charges with the lighter itself being detained for an indeterminable period, and when the lighterman has to hire a lighter for another job in the place of a delayed one, reasonable rates are shown to be \$80 per day each for scows and covered barges and \$90 per day for stick lighters.

73. Vessels are worked by plan in which stowage, itiner-ary, vessel trim or balance and such matters play a role. Thus vessel loading and discharging are in such order and in such amounts as suits the convenience of the vessel and the stevedore working the vessel. Most cargo is unaffected by such matters. In the case of export cargo, for example, cargo can be worked from the pier as seen fit by the stevedore, and no third party is affected by the process of selection. For the lighterman, however, whose lighter is being worked over-the-side, the selection process is im-portant as his equipment and his employees must stand by for the time it takes to complete the work—in many cases to his cost detriment.

74. Respondents state that they pay demurrage on railroad lighters; and that the detention bills of the private lightermen are turned over to the steamship companies, for the reason that the delay involved normally is caused by the carrier rather than by the terminal operator. Respondents state that it is their understanding that the private lightermen's bills for detention are paid by the steamship companies; and that, accordingly, the private lightermen are not prejudiced by the terminal operators not doing so.

75. Hearing Counsel state that respondents do not appear to contest the propriety of the detention payment itself, but their chief concern seems to be the role of the steamship company in the detention issue. Hearing Counsel state that it is the terminal who assesses charges against the lighterman and it is the terminal with whom and through whom the lighterman works during the entire transfer process; that for stevedoring purposes, the terminal stands in the place of the ocean carrier by assuming the carrier's traditional obligation of loading and unloading; that even if detention is caused by the carrier, it is only natural to look to the terminal for redress; that the lighterman cannot be expected to seek out fault—this being a matter between the carrier and its contractor, the terminal; that the terminal is the proper party to assume responsibility for detention; and that the problem could easily be handled through the adoption of a suitable detention rule in the lighterage tariff. Hearing Counsel state that a reasonable detention rule for lighters is necessary and past failure of the terminals to use one is unreasonable and within the prohibitions of Section 17 of the Act; and that adoption of such a rule for the future should be ordered by the Commission in this proceeding.

76. It is obviously not feasible for the lighterman to have a voice in the actual loading or unloading of vessels, but inasmuch as he often experiences detention of his craft

for reasons residing entirely within the stevedoring process, it is only proper that he be compensated for his extraordinary costs. The lightermen have detention (demurrage) agreements with some steamship companies but collection has been unsatisfactory in the past. In some cases the steamship companies pay, and in other cases they do not, and the lighterman is often left to bear the entire cost of detention although the cause is not due to his fault or in any way for his benefit or convenience. For these reasons, and those stated by Hearing Counsel in this part, it is unjust and unreasonable for respondents to fail to adopt a just and reasonable lighter detention rule or regulation in their lighterage tariff; and failure to do so for the future will be, as it has been in the past, in violation of Section 17 of the Act.

Truck detention

77. Respondents' Tariff No. 6 contains an item providing as follows:

ITEM 16. DELAY TO MOTOR VEHICLES

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

78. The record shows that there is congestion and excessive delay in truck loading and unloading at the piers; that normal delays run from one to several hours; and that the trucks begin arriving at the piers more than one hour before they open in order to offset the delay they will experience.

79. One trucker experienced an instance as follows: He arrived at a pier at about 7:00 a.m. for a load of hams (1480 cases), was routed at about 8:00 a.m., started work at about 9:30 a.m., at about 4:30 p.m. when still not loaded was told that all were going home, and about 5:30 p.m.

the terminal decided to finish loading, which it did, and the truck got off the pier at about 9:00 p.m.

80. Delay is perhaps the greatest single problem involving truck traffic. Witness after witness attested to the inconvenience and expense to motor carriers resulting from the chronic delay of vehicles delivering or receiving cargo at the piers. These delays are a serious problem to the motor carriers because the resulting inefficient use of equipment and labor tends to increase operating costs, thus affecting their ability to compete with other modes of transportation. They are a problem to shippers and receivers because such increased costs are necessarily passed on to them in the form of higher rates. For this reason, the trucker interveners (truckers) state that a workable detention rule is absolutely necessary, and to be workable it must not only include a charge sufficient to recover the cost of the delay, but also assure that the charge will act as a deterrent by penalizing the person responsible for the delay. The truckers state that a reasonable detention rule would aid considerably in reducing, if not eliminating, the serious problem of delay now existing at the New York piers. Exhibit 74, they state, is such a rule. It contains a scheduling provision which is described as the key to a fair and equitable rule. This provision provides for the running of free time to commence at the start of loading or unloading where a prearranged schedule for the arrival of the vehicle is made and followed.

81. The truckers state that the discriminatory nature of Item 16 (par. 77, above) is apparent when it is compared with respondents' Tariff No. 2, which expressly provides that:

"Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard collection of lighterage detention charges from steamship companies."

Thus, the truckers state, while respondents attempt to immunize themselves from any penalties for delay with respect to motor vehicle traffic, they hold themselves out to honor such penalties where traffic moving to and from the piers by lighter is involved, and that these contrasting provisions are patently preferential to one class of traffic and discriminatory to another.

82. The truckers state that the Commission has held that carriers should not be permitted by means of a tariff rule to exempt themselves in advance from responsibility for detention, *Transportation of Lumber Through Panama Canal*, 2 U.S.M.C. 143, 145 (1939); that the Commission has further stated that, since all receivers of cargo must use the piers, "any preferred treatment, by charges or otherwise, of certain classes of cargo results in discrimination against other cargo", *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 48, 52 (1939); that moreover, this prohibition against discriminatory treatment of cargo by classes clearly applies to cargo classified by the mode of transportation involved; that thus, in *Penna. Motor Truck Ass'n. v. Phila. Piers, Inc.*, 3 F.M.B. 789, 795 (1952), the Commission held that a provision in a terminal tariff providing more free time for freight moving by rail than that allowed for truck cargo was an unjust and unreasonable regulation and practice; and that in so holding the Commission stated at page 795:

"If respondents permit the use of their piers to the vessel owners for the receipt and delivery of truck cargo, they thereby assume responsibility to carry out the ocean carrier's full duty toward truck cargo. This includes furnishing non-discriminatory and reasonable pier service, and service which is in no other respect in violation of the Act."

These cases, the truckers contend, compel the conclusion that Item 16, (par. 77, above) is discriminatory and prej-

udicial to motor carriers, and motor carrier cargo, and that respondents should therefore be directed to eliminate it from the tariff.

83. Respondents state that there has been no effort to analyze causes of delay, its relationship to the commerce of the United States, or to the public interest. Respondents state that the causes of delay of trucks are multifarious and usually beyond the control of any one person; that, in addition to the causes for delay stated elsewhere in this part, piers cannot all be constructed or organized to handle peak loads so as to be adequate "at all times" to meet "the full needs" of transportation; that there are causes created by governmental agencies, beyond the control of pier operators or the trucks; that there are also the inevitable factors of strikes, slowdowns, or refusals to work after 5:30 p.m.; that whatever may be the dominant factor or cause in any particular instance, it is clear that no sole responsibility or cause can be attributed to respondents; and that even were that possible, remedies are beyond the Commission's jurisdiction under the Shipping Act.

84. Hearing Counsel point out that the causes of truck delays at the piers are varied and not all the fault of the terminal operators; and that such delays often result from congestion and congestion itself may result from causes not traceable to either the truckmen or the terminals. Thus in the Port of New York where some piers still exist that were originally designed to handle lighterborne cargo rather than truck carried cargo, congestion is the result of inadequate facilities. Hearing Counsel state that terminal operators can be held to some measure of accountability for conditions of piers and the congestion resulting therefrom. *Penna. Motor Truck Ass'n v. Phila. Piers, Inc.*, 4 F.M.B. 192 (1953). The apparent insistence of shippers to forward export cargo on the day of sailing or the day prior to sailing is a cause of heavy traffic at such times as is the tendency of shippers to wait until the last day of

free time to pick up import cargo. Shippers sometimes present improper documentations at the piers, causing delay. The truckers themselves cause delay, since they are, on occasion, absent from their trucks when called for service. The terminals cause delay, insufficient labor and/or equipment being an example. Also, inadequate control of labor results in delay. The record is replete with specific allegations and counterallegations concerning the delay of trucks at the piers.

85. Generally, truckmen have a right to expect handling as expeditiously as possible, and they have a right to get better handling than they have had in many specific cases. Various suggestions have been made to improve on the total time trucks spend on the piers, such as: a port co-ordinator, night shifts, wider use of the appointment system and new piers in New York. To the extent that any would help they are laudable but none is susceptible to immediate implementation and most involve considerations beyond the scope of this investigation and the evidence taken.

86. As a more immediate solution, Hearing Counsel suggest the adherence to a reasonable detention rule in respondents' Tariff No. 6. Hearing Counsel add that because of the many reasons for delay and because delays occur for which the terminals are not at fault, though most of the delays are within the control of respondents, a reasonable detention rule for trucks must acknowledge causation and exonerate the terminal for delays which it cannot control.

87. Hearing Counsel conclude that under Section 17 of the Act, the terminals should be ordered to delete Item 16 of their present tariff (par. 77 above) and to offer a reasonable detention rule which would compensate the truckmen for unusual delays caused by or under the control of the terminals; and that respondents' failure to adopt such detention rule is unreasonable in violation of Section 17 of the Act.

88. Respondents, in reply to Hearing Counsels' position "that a reasonable detention rule based on the fault of the terminal is required", state that Hearing Counsel do not compose such a proposed detention rule, and that the Commission's notice of investigation contains no such proposal. Replying to Hearing Counsels' position that respondents be required to offer a reasonable detention rule under their Tariff No. 6, respondents state that they are not seeking any order in this proceeding and cannot be required to propose a tariff rule; that, in any case, the Commission has not instituted a rule making proceeding looking toward a truck detention rule for the tariff; and that it could not now require a rule without placing itself in violation of Section 4 of the Administrative Procedure Act (APA).

89. In this connection, respondents state that the order of investigation does not contemplate rule making in the sense of proposing to insert new rules and regulations into their Tariff No. 2 and their Tariff No. 6; that absent the publication of a proposed tariff provision, required by Section 4(a) of the APA, they are not called upon to answer this and the other tariff rule issues discussed herein; and that there is no statutory provision requiring terminal operators to adhere to tariff provisions.

90. The truckers state that Section 4(a) of the APA governs only the procedures under which administrative agencies promulgate substantive rules and regulations implementing their statutory powers; that it in no way governs the Commission in the exercise of its statutory rate making power to order the establishment of lawful rates, rules and practices in proceedings instituted to investigate the lawfulness of tariffs subject to its regulation; that the determination of lawful rates and practices is in the nature of a judicatory proceeding; and that respondents had adequate notice that the lawfulness of their tariff provisions would be in issue in this proceeding (APA 4(a) relates to

notice, 4(b) procedures). The truckers further state that respondents' argument that they are not required by statute to adhere to their tariff provisions ignores the clear language of Section 17 of the Act requiring each carrier and every other person subject to the Act to establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, and delivering of property; and that obviously, since the Commission is vested with authority to prescribe just and reasonable rates and practices, it is empowered under Section 17 of the Act to enforce compliance. *Storage Charges Under Agreements 6205 and 6215, supra*, p. 53 (1939).

91. Hearing Counsel state that this proceeding is not wholly adjudicatory; and that "One obvious reason why whole proceedings cannot properly be labeled 'judicial' or 'legislative' is that in a single proceeding, a tribunal commonly acts both judicially and legislatively." *Administrative Law Treatise*, Davis, Vol. 1, Section 7.03. Hearing Counsel further state that respondents were served with notice of this proceeding and all parties received the fullest measure of the procedural guarantees found in the APA.

92. For the reasons stated by the truckers and by Hearing Counsel, respondents' argument regarding rule making is inapplicable here.

93. The fact that Tariff No. 2 provides that lighter operators may collect lighter detention charges from steamship companies; and the fact that Tariff No. 6 provides that no claim for delay to motor vehicles will be honored, results in unreasonable preference to lighter traffic and unreasonable prejudice to motor vehicle traffic in violation of Section 16 First of the Act.

94. Based upon the foregoing discussion, in this part (5), respondents should delete Item 16 (par. 77, above) from Tariff No. 6 and insert a reasonable detention rule

therein which will compensate the truckers for unusual truck delays caused by or under the control of the terminals. Respondents' failure to establish and apply such truck detention rule is unreasonable in violation of Section 17 of the Act.

95. Next, in sequence, are the questions relating to refund of revenues. These arise under part (6) of the Commission's order:

(6) whether any agreements exist between the parties to Agreement No. 8005 and the ocean carriers using their facilities whereby part of the revenues collected from lighter operators is refunded to the carriers; whether such agreements are subject to section 15 of the Act; and whether such agreements violate Article 2 of Agreement No. 8005, which prohibits refunds "in any manner or by any device."

96. Disposition of the issues under this part, part (6) of the Commission's order, is reserved for a later supplemental decision. See page 2 and the APPENDIX.

97. Considered finally are the questions presented in part (7) of the Commission's order, namely as to:

(7) whether any of the rates, rules, regulations or practices of the respondents are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or in any manner violate the Shipping Act, 1916.

Tariff No. 6, Item 3, 1, B, Truck Loading

98. This item provides that "The loading and stowing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck". The record, however, shows that in many cases this rule is

not observed, as each respondent establishes its own criteria for the amount of freight which it will place on a truck. For example, some respondents will load bagged goods only 4 or 5 bags high, or man-high regardless of the height of the man doing the loading. An uneconomical consequence of this is where a trucker calls for a shipment of 500 bags of a commodity, with a truck capable of picking up the whole shipment, and the terminal will only load 400 bags, making it necessary for the trucking company to send another truck to the pier for 100 bags. The truckers state that this practice is unjust and unreasonable and can and must be corrected by the insertion of a provision for uniform loading standards at all of the piers.

99. For respondents' position on tariff rules and rule making, see paragraph 89, above.

100. Hearing Counsel point out that the truck loading provisions under this item of Tariff No. 6 have no criteria as to what constitutes a truckload; that the record contains illustrations where truckmen dispatched truck capacity to the piers to receive cargo only to find out later that the terminal employees loading the truck considered the capacity so dispatched as being insufficient; that the problem here may be the difference of opinion as to how much capacity is required for a given amount of cargo, but the greater problem is the failure of the tariff to set standards; and that with set standards, both parties would know what is expected.

101. If the tariff item here under consideration (par. 98, above) does not mean that the truck driver has some say as to how much cargo will be loaded onto his truck, the item should be amended stating who has the determination, and fixing the criteria as to what constitutes a truckload uniformly at all of respondents' piers. Failure to do this will result in violation of Section 17 of the Act.

Tariff No. 6, Item 3, 2, C, Truck Unloading

102. This item purports to grant a trucker the right to unload his truck. In such a case, the trucker makes the freight available to the pier operator on the tail gate of the truck. However, the record shows that some truckers are required to utilize the services of the pier operator. That is, if the trucker engages the stevedores the truck is unloaded, otherwise not; and some terminal operators have refused to make available to truckers a checker and a hilo operator when the trucker desired to do his own unloading. The record also shows that some terminal operators will not handle less than full loads, insisting upon the whole load or none. These instances would arise where the truck-load consisted partially of "heavy lifts" which the trucker could not handle and thus had to engage the terminal operator, and partially of cargo which the trucker could and desired to handle.

103. Respondents' tariff agent testified that it is not economically feasible for respondents to handle less than full loads. However, the tariff contains no limitations with respect to partial loads; and some of respondents allow truckers to do partial unloading.

104. Because truckers are required to utilize the services of the pier operator for truck unloading when the trucker can and desires to do the unloading himself, and because some terminal operators will not handle less than full loads of the type of partial unloading referred to, respondents have failed to observe the provisions of Item 3, 2, C, of their Tariff No. 6; and their practices in this respect are unreasonable in violation of Section 17 of the Act, and in violation of Article 2 of Agreement 8005.

Tariff No. 6, Item 8, Collection for Services Rendered

105. This rule provides for credit arrangements; and when established, if the trucker fails to pay charges speci-

fied in the tariff, the shipper or consignee shall become liable for such charges.

106. A principal complaint of the truckers is that their credit is subject to unilateral cancellation by the respondents if an objection is made to a rate or the application of a tariff regulation. Thus, one respondent terminated a trucker's credit when the trucker refused to pay an assessment for an additional loader. The trucker contended that this charge was not authorized by the tariff. Similarly, when another trucker disputed a rate he was faced with the ultimatum of either paying the bill as submitted or getting no service. The record shows other instances where truckers' credit had been terminated.

107. Truckers advance substantial funds for shippers when they pay the tariff rates for services rendered, and their loss of credit results in economic damage, even when the dispute is promptly settled, because in straightening the matter out they lose a few hours of time.

108. The truckers state that it is unreasonable to permit respondents to arbitrarily and capriciously terminate a motor carrier's credit when such carrier refuses to accept the respondents' self-serving interpretation of a tariff.

109. There is no doubt but what the instances concerning credit termination here complained of resulted in some inconvenience and some expense to the truckers. However, it is not established on the record that such instances as described resulted in violation of Item 8 of Tariff No. 6 or of the Shipping Act.

Tariff No. 6, Item 10, Three O'clock Rule

110. This rule provides that:

"A truck in line to receive or discharge cargo by 3 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded,

is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator."

111. As to the last sentence of the rule, which excludes trucks unloaded without the services of the terminal operator, the truckers state that there is no just and reasonable distinction which warrants the exclusion from the rule of vehicles which the trucker elects to unload himself. The truckers state that the terminal has no interest in a trucker who unloads his own truck, but such trucker is entitled to service if he is at the pier by three o'clock; that the terminal should have no power of election to service, or not to service, the truck; and that the truck should be serviced regardless of whether the motor carrier or the terminal operator will perform the unloading.

112. Hearing Counsel state that the service guarantee of the three o'clock rule is an important one and no good reason appears why it should not be applicable to all vehicles arriving at the piers before three o'clock; that the lack of complete application of the rule deprives the truckman of certainty he should have of the status of any vehicle dispatched and given a gate pass before three o'clock; that the lack of certainty is objectionable and until the element of certainty is provided, the rule is unreasonable; and that Section 17 of the Act requires amendment or modification of the rule to extend application thereof to cases where the trucker unloads his own truck.

113. Respondents state that to make the three o'clock rule applicable to the unloading of trucks by the trucker as well as when that service is performed by the terminal operator would be wholly unreasonable; that when the terminal performs loading or unloading services, the speed of this operation is within its control; that in such circumstances the terminal is in a position to make good

his guarantee that if a truck is presented for loading by three o'clock, loading will be accomplished that day without charges for overtime; that when the trucker performs his own unloading, the speed of unloading is not within the terminal operator's control; that it would be wholly unreasonable to require him to guarantee performance of the service on the day the truck is presented therefor; and that such an unreasonable rule could not be imposed under the guise of enforcing "just and reasonable regulations and practices" under Section 17 of the Act. For respondents' position on tariff rule issues see paragraph 89, above.

114. For the reasons stated by the truckers and by Hearing Counsel, that part of the three o'clock rule here under consideration is unjust and unreasonable in violation of Section 17 of the Act, and the rule should be amended to extend application thereof to cases where the trucker unloads his own truck.

115. As to the three o'clock rule in the whole, the truckers urge elimination of the rule and the establishment of night shifts on the piers. Such a procedure, they state, would inevitably eliminate congestion on the piers and improve the efficiency of the respondents' operations. Some of the terminals work nightshifts discharging vessels, but not working trucks.

116. The evidence shows that some of the terminals have failed in several instances to comply with the provisions of the three o'clock rule. In some of such instances the trucker arrived at the pier at 1:00 p.m. and was told at 6:00 p.m. there would be no service; another trucker experienced a number of instances of arriving at the pier before 3:00 p.m. and was not serviced; another trucker was being serviced after 3:00 p.m., was stopped at 5:00 p.m., and had to leave the truck over-night and return the next day; and service for another trucker was started at 4:00 p.m., and at 5:00 p.m. one third of the load was off when

the service was stopped and the trucker had to return the next day.

117. In *Docket No. 800*, the Commission (F.M.B.) found that "there have been numerous examples of violation of the 'three o'clock rule'—in that trucks checked in before three o'clock p.m. were not worked at straight-time rates until loading or discharging was completed." Likewise, in the present case the evidence shows (paragraph next above) that some of the terminals have failed at times to comply with the "three o'clock rule"; and in this case as in *Docket No. 800* such failures to comply with the rule were unjust and unreasonable practices relating to the receiving, handling, or delivering of property, in violation of Section 17 of the Act.

Tariff No. 6, Item 11, Inadequate Manpower on Trucks

118. The part of this item here involved provides:

"When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall proceed at a rate of five tons (10,000 pounds) per hour. When this rate is not maintained a penalty charge of \$1.00 for each quarter hour or fraction thereof shall be assessed for the excessive time."

119. A witness for respondents testified that 10,000 pounds per hour is a relatively efficient job of unloading trucks; that many trucks can unload faster, and many are unloaded more slowly; that it is not the intention of the terminals to use this provision strictly as it is written in the rule; that it is merely their solution to a very serious dilemma; that 10,000 pounds per hour is much too much to ask on some commodities; and that the terminals do not enforce the rule except in outrageous instances of slow working.

120. The truckers acknowledge that a productivity standard, such as the 10,000 pound rule, has many advantages,

and they would have no objection to such a rule if it also applied against the terminal operators with equal force. The truckers state, however, that this tariff item is not just and reasonable because it establishes a uniform standard for all types of cargo, without weight being accorded to the admitted different loading characteristics of varying types of cargo; that the truckers should not be required to maintain a fixed degree of production which the terminal operators either are unable or unwilling to meet; and that if the rule cannot be enforced, it should not be in the tariff.

121. Respondents acknowledge that this rule does not always work, but see also their position concerning rules in paragraph 89, above.

122. The truckers, respondents, and Hearing Counsel point out, that this tariff rule, in many cases, is not being applied. For this reason and because it may be applied against only some truckmen, the rule is unreasonable in violation of Section 17 of the Act, and it should be deleted from the tariff.

Tariff No. 6, are the rates per se unlawful

123. Tariff No. 6 was grounded upon certain cost studies made by the pier operators. Based on these studies, the Conference advised its members that rate increases would be published. At the time Tariff No. 6 was published, respondents relied upon prior commodity studies (not made available at the hearing) as the basis for the rate differentials published in the tariff.

124. The truckers, upon their analysis of the cost data which was furnished at the hearing by respondents, state that such studies failed to properly reflect the gross revenues, in that they were grossly understated; that the rates exceed respondents costs by approximately 100 percent; and that accordingly the rates in Tariff No. 6 are unjust and unreasonable and must be cancelled.

125. Respondents state that the Commission's order does not contemplate an inquiry into the level of the truck loading and unloading rates; that this is not a rate case; that whether the rate level is too high or too low is not in issue. As to the truckers' argument that the rates are unreasonably high, respondents deny that this is true, but under the order they do not believe they are called upon to respond.

126. Hearing Counsel state that this proceeding is not a rate investigation and that there is no basis in the record for declaring the rates in Tariff No. 6 to be unlawful.

127. The position of respondents and Hearing Counsel that this is not a "rate" or "rate level" case is sustained; and therefore, the general level of the rates stated in Tariff No. 6 are not shown to be unjust or unreasonable.

*Should the costs of truck loading and unloading
be borne by steamship companies*

128. The truckers state that the costs of truck loading and unloading should be borne by the steamship companies, on the following grounds. Each of the respondents is a terminal operator or steamship company conducting terminal operations with respect to waterborne cargo moving in foreign commerce. Included in these terminal activities is the operation of truck loading and unloading. The steamship company designates the pier at which it will receive or deliver freight and there is a variety of agreements and arrangements between the terminal operators and the steamship lines allowing the respondents to perform terminal operations, and the terminal operators consider themselves responsible to the steamship lines. The stevedoring rates paid by the steamship lines cover certain of the terminal operation costs of the respondents and frequently the terminal operators are engaged on a cost plus basis. Although the piers are controlled by the steamship lines and by the respondents, and delay is caused by

them, the truckers are required to advance the terminal charges for the customers of the steamship lines. Truckers advance thousands of dollars each week in terminal charges. In an instance of a copper shipment, a trucker advanced \$10,000.

129. The truckers state that these facts show that it is unjust and unreasonable to permit the terminal operators to publish tariff rates; that instead, the steamship companies should pay the respondents for their terminal work and pass the cost on to their customers by including it in the ocean freight rate; that since the pier is a "unit" there is no rationale for segregating stevedoring and terminal operations, particularly since many of the terminal costs of the respondents are covered by the stevedoring rates paid by the steamship lines. Respondents' operating witness testified that his company would have no objection to the steamship companies paying for the terminal services which respondents perform pursuant to contracts with the steamship lines. Respondents' agent objected to termination of the present practice, mainly on the ground it would upset present customs.

130. The truckers state that efficiency and economy will be promoted only if the steamship lines are required to assume the costs and responsibilities of truck loading and unloading; that the nature of terminal operations and the need to protect the public require that such costs be borne by the vessel rather than the cargo; and that the Commission has the power and should eliminate the practice of a separate charge for the handling of freight between the point of rest and vehicle. In this connection the truckers cite *Sun-Maid Raisin Growers Ass'n v. United States*, *supra*, p. 962, where the Court stated:

"Assuming, without deciding that the practice of making separate handling charge is a "practice" within the meaning of the Shipping Act, such that if it is unreasonable or unjust it can be controlled by the Mari-

time Commission, it is quite clear that the regulation of such a practice lies wholly within the discretion of the Maritime Commission."

131. Hearing Counsel state that they cannot agree that steamship companies should bear the costs of truck loading and unloading, because such conclusion would disregard the division of responsibilities considered by them to be important for cargo's own protection.

132. The Sun-Maid Raisin case does not support the truckers' contention, and is not in conflict with the conclusion herein. Involved there was the reasonableness under Section 17 of an existing practice of collecting separate charges for handling general cargo beyond ship's tackle, and the Commission's control over such practice. Here involved is a proposal to establish a new program altogether (departing from custom at New York) where the total charges would be included in the ocean freight rate. In the case cited, the Commission held that neither Section 17 nor other sections of the Act relating to foreign commerce require carriers to publish their charges in single amounts or prohibit them from dividing their rates and making specific charges for the different services performed. While the truckers' proposal, if adopted, may result in an improvement over the present system of handling cargo at the New York piers, the requirement sought is not adequately supported by the record or shown to be authorized by the Shipping Act.

*Lighterage, failure to charge tariff rates
in some instances*

133. During the last half of 1963, certain respondents handled 17,621 tons of cargo over-the-side for railroads free and clear of any charges while charges were assessed against 55,616 tons of cargo from private lighters. During eleven months in 1963, there were several instances where certain respondents performed over-the-side service for the

McAllister Lighterage Line, Inc. for which McAllister was not billed under Tariff No. 2. These instances were testified to and documented by the witness representing McAllister at the hearing. A witness representing Henry Gillen Sons' Lighterage, Inc., testified that he knew of no instance in which his employer did not receive bills for over-the-side work performed under the tariff.

134. Respondents acknowledge that certain billings had not been made; due, they state, to inadvertence; that in such instances balance due bills immediately were rendered during the hearing; that the conference agent circulated a letter to members requesting them to review their lighterage billings and bill for any uncollected tariff charges discovered. Respondents further state that even were the failure deliberate—which it was not—omission of collection is not a violation of Section 15 unless it is the result of agreement or concerted action; that there is no evidence to that effect; that the isolated failures to collect were not in fact done in concert or by agreement; that preference or prejudice under Section 16 First must be based upon a competitive relationship and injury; that neither was shown; and that any argument to the contrary would be entirely without merit.

135. The rendition of a service specified by tariff without assessing the tariff charge therefor constitutes a violation of Section 16 First to the extent that it grants a preference or advantage to the recipient of the "free service" and that the preference so granted is an unreasonable one in that other recipients of the service are charged therefor.

136. By not assessing tariff rates, the respondents have violated Article 2 of Agreement 8005. This failure to abide by said Agreement, is also a violation of Section 17 of the Act wherein persons subject to the Act are admonished to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

*Tariff No. 2, is the 14 percent rate
increase reasonable*

137. This tariff became effective, as before stated, on May 27, 1963. Respondents state that they did not consult with either the private lightermen or Spencer in the preparation of this tariff; and that it is virtually a copy of Tariff No. 1, but with a 14 percent rate increase to recoup for ILA wage increases. The record does not show that the rate increase here involved is unjust or unreasonable.

Tariff Procedures

138. As pointed out by the truckers, respondents' Agreement No. 8005 contains no provisions governing the procedures under which it establishes and publishes terminal rates. Thus, there is no requirement that notice of a proposed change in a rate or tariff provision be given interested parties, or that they may be heard on matters relating to the adoption of, or changes in, tariff provisions. The record shows, however, that where interested persons have specifically written to the Conference requesting permission to appear and be heard on a particular matter, they have been heard. Public notice of such meetings is not given.

139. Hearing Counsel state that copies of tariffs are available through the Conference or can be found posted at piers. Hearing Counsel take no issue with the procedures employed by the Conference on these matters. They state that the procedures employed by the Conference in making its tariff available, advising of changes in the tariff and in receiving and considering complaints and suggestions are adequate and not violative of Section 15 of the Act.

140. The truckers point out that in 1939, in a proceeding involving the charges and practices of terminal operators, the Commission declared that the failure to provide for adequate notice, publication, and posting of tariff charges

is an unjust and unreasonable practice. *Transportation of Lumber Through Panama Canal, supra*, p. 149, and other cases cited. In *Pacific Coast-European Rates and Practices*, 2 U.S.M.C. 58, 61 (1939), the Commission outlined the nature of the duty imposed on Conference members by Section 15, and stated that the advantages of approval of a conference agreement

“... place upon conference members the duty to consider shippers' needs and problems, and to provide for the orderly receipt and careful consideration of shippers' requests with full opportunity for exchange of views.”

141. Section 15, as amended, provides that

“The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.”

142. Respondents are obligated by Section 15 to afford all persons an equal right and opportunity to appear and be fully heard on all matters concerning their rate making activities. This duty, in turn, requires respondents to formulate and prescribe rules and regulations governing the procedures under which this duty is carried out. Moreover, such procedures must be set forth in respondents' Section 15 Agreement, and meet the approval of the Commission under the provisions of that Section. This is so because they constitute the very safeguards by which the Commission is assured that respondents are not acting beyond the narrow confines of the antitrust immunity which that Section provides in authorizing concerted activity in the fixing of rates. This is a fundamental requirement and failure to comply results in violation of Section 15, as amended.

Port Co-ordinator

143. The truckers state that the Port of New York is plagued with ineffective co-ordination in the interline of waterborne freight between the steamship lines and motor carriers; that as to the interline of such freight with the agents of the steamship companies, namely, the terminal operators, the motor carriers are entitled to an equal voice in establishing the conditions of interline; that the terminal operators, however, have refused to grant motor carriers any rights with respect to the transfer of freight; and that accordingly, it is indispensable that an independent Port Co-ordinator's office be created to supervise the movement of freight in the Port of New York and to provide a forum for all parties to seek redress of their complaints.

144. The truckers state that negotiating committees of the Conference and of the truckers in 1958 reached an agreement as to the establishment of a Port Co-ordinator's office; that this agreement Exhibit numbers 103 and 104, contained an initial program designed to improve the efficiency of the port and to prevent tariff violations and operating abuses; but that respondents have refused to implement this program. The truckers request the Commission to direct respondents to implement the agreement, or a similar plan reached after agreement with all parties interested in ocean commerce in the Port of New York, and thus require the creation of a Port Co-ordinator's office which will be able to control the flow of traffic to and from the piers.

145. Without finding that a Port Co-ordinator's office as defined by the truckers is necessary, the evidence being inadequate for such purpose, this record does not show that the Commission has any authority to direct the establishment of such office.

Miscellaneous issues

146. Several issues were raised at the hearing on which the evidence is inadequate for making findings and con-

clusions, or separate findings and conclusions are unnecessary because of other findings and conclusions herein having some bearing on such issues. The issues referred to involved safety, minimum charges, overtime charges, palletizing cargo, weighing of cargo, refrigerated cargo, Export cargo, Japanese cargo, hold-on-dock cargo, night shifts, number of truck lines for service on the piers, U. S. Customs, overtaxing of piers, and the appointment system.

Summary of Findings and Conclusions

Based upon the foregoing it is found and concluded, in summary, as follows:

1. The rate fixing authority granted by Agreement 8005, as amended, is limited to the fixing of rates only with respect to service to lighters alongside piers. Therefore, respondents' practice of assessing charges against lighters alongside vessels is an unjust or unreasonable practice in violation of Section 17 of the Act.
2. The service involved, direct transfer of cargo between lighter and vessel, is a stevedoring service paid for by the ship; and therefore, when respondents assess a charge for this service under their Tariff No. 2, cargo is paying a double charge for a single service which is unjust and unreasonable in violation of Section 17 of the Act.
3. Agreement No. 8005, as amended, does not permit respondents to amend the definition of truck unloading in their Tariff No. 6 to include the vessel itself as a "place of rest", because there is no language in the Agreement indicating such permission, because "place of rest" means a specified area on the dock, and because direct transfer of cargo between truck and vessel, as between lighter and vessel, is a stevedoring service paid for by the ship; and therefore, when respondents assess a charge for this service under their Tariff No. 6, cargo is paying a double charge for a single service which is an unreasonable practice in violation of Section 17 of the Act. Such charges

are not within the scope of the Agreement; and therefore, respondents exceeded their authority, in violation of Section 15 of the Act in fixing and assessing such charges. In addition, such charges subject a particular description of traffic to undue or unreasonable prejudice or disadvantage in violation of Section 16 First of the Act. Accordingly, the use of the term "vessel" in Item 3, 2, A, of respondents' Tariff No. 6 should be deleted from the tariff.

4. Respondents' Tariff No. 2 does not include rates assessed against lighters loaded or unloaded alongside piers; and the tariff provides no standards by which individual member terminals will be guided in determining such rates or charges for such service. Therefore, the failure of respondents to include in their tariff rates assessed against lighters alongside piers (as distinguished from alongside vessels) is a violation of Sections 15 and 17 of the Act and of Article 4 of Agreement No. 8005, as amended.

5. Tariff No. 2 provides for assessment of charges to private lighters for direct service and no charge to railroad lighters for the same service. Therefore, apart from the stevedoring considerations herein, respondents' assessment of charges under the tariff to private lighters while handling railroad lighters free violates Sections 16 First and 17 of the Act.

6. Because lightermen sometimes incur extra costs due frequently to long delays not their fault but due to the stevedoring process in over-the-side service, and should be compensated for such costs, respondents should establish a reasonable detention rule in their lighterage tariff. It is unjust and unreasonable for respondents to fail to adopt a just and reasonable lighter detention rule or regulation in such tariff, and their failure to do so for the future will be, as it has been in the past, in violation of Section 17 of the Act.

7. Because respondents' Tariff No. 2 provides that lighter operators may collect detention charges, and their Tariff No. 6 provides that no claim for delay to motor carriers will be honored, respondents give an unreasonable preference to lighter traffic and subject motor vehicle traffic to unreasonable prejudice in violation of Section 16 First of the Act.

8. Because there are frequent excessive delays in truck loading and unloading at the piers, resulting in extra expense to the truckers, due to or within the control of respondents, respondents should delete Item 16 from their Tariff No. 6 and establish and adhere to a reasonable truck detention rule which will compensate the truckers for such delays; and respondents' failure to do so is unreasonable in violation of Section 17 of the Act.

9. Because Item 3, 1, B, of Tariff No. 6 provides no criteria as to what constitutes a truckload, each respondent establishing its own criteria, resulting in disputes between the terminals and the truckers, and in many instances of non observance of the item, it should be amended stating who has the determination, and fixing the criteria as to what constitutes a truckload uniformly at all of respondents' piers so the parties would know what to expect. Failure to do this will result in violation of Section 17 of the Act.

10. Because truckers, sometimes, are required to utilize the services of the pier operator for truck unloading when the trucker can and desires to do the unloading himself, respondents have failed to observe the provisions of Item 3, 2, C, of their Tariff No. 6; and their practices in this respect are unreasonable in violation of Section 17 of the Act, and in violation of Article 2 of Agreement 8005, as amended.

11. It is not established that the instances of credit termination described in the record resulted in violation of Item 8 of Tariff No. 6 or of the Shipping Act.

12. Because Item 10 of Tariff No. 6 provides for after three o'clock service to trucks loaded or unloaded by the terminals while denying such service to trucks unloaded by the truckers without adequate reason for such distinction, and because both categories of trucks should have the same assurances and treatment, the rule is unreasonable in violation of Section 17 of the Act and should be amended to extend application to cases where the truckers unload their own trucks.

13. Because some of respondents have failed in several instances to comply with the provisions of the three o'clock rule, Item 10 of Tariff No. 6, in that trucks checked in before three o'clock were not serviced at straight-time tariff rates until loading or discharging was completed, such failures to comply with the rule were unjust and unreasonable practices relating to the receiving, handling, or delivering of property, in violation of Section 17 of the Act.

14. Because the truck unloading rate of 10,000 pounds per hour stated in Item 11 of Tariff No. 6 is not, and cannot be enforced in all cases, and may be applied against only some truckmen, the rule as to such truck unloading rate is unreasonable in violation of Section 17 of the Act and should be deleted from the tariff.

15. The general level of rates in Tariff No. 6 is not shown to be unjust or unreasonable.

16. Requirement by the Commission that the cost of truck loading and unloading be borne by steamship companies is not adequately supported or justified by the record and such requirement is not shown to be authorized by the Act.

17. Because certain respondents performed over-the-side service, under Tariff No. 2, without charge in several instances while charging tariff rates in other instances they violated Sections 16 First and 17 of the Act and Article 2 of Agreement 8005, as amended.

18. The 14 percent rate increase in Tariff No. 2 is not shown to be unjust or unreasonable.
19. Failure of respondents to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints results in violation of Section 15 of the Act.
20. Authority in the Commission to establish a Port Coordinator's office in the Port of New York is not shown.

Ultimate Conclusions

- I. Failure of respondents properly to comply with the express provisions of Agreement 8005 and the tariffs issued thereunder found to be in violation of Sections 15, 16 First and 17 of the Shipping Act, 1916.
- II. Failure of Respondents to establish and adhere to reasonable lighter and truck detention rules found to be in violation of Section 17 of the Shipping Act, 1916.
- III. Record instances of credit termination found not to be in violation of the Shipping Act, 1916.
- IV. General level of rates in Tariff No. 6 and the 14 percent rate increase in Tariff No. 2 not shown to be unjust or unreasonable in violation of the Shipping Act, 1916.
- V. Failure of respondents to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints found to be in violation of Section 15 of the Shipping Act, 1916.

A. L. Jordan
Presiding Examiner

Washington, D. C.
July 15, 1965

APPENDIX

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

June 25, 1965

No. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING
PRACTICES IN NEW YORK HARBOR

NOTICE OF FURTHER PROCEDURE

The undersigned on March 24, 1964, issued, on behalf of intervener Empire State Highway Transportation Association, Inc., a subpoena duces tecum to respondents herein, requiring them to produce certain terminal and stevedoring contracts. On April 14, 1964, after determining that respondents had not fully complied with said subpoena, the undersigned referred the matter of non-compliance to the Commission. The Commission, on May 28, 1964, referred the matter to the Department of Justice requesting that the said subpoena be enforced. The Department of Justice, on May 27, 1965, filed a motion for enforcement in the U. S. District Court (D. C.), where the matter is now pending.

Apart from and wholly independent of the issues to which the documents called for in the said subpoena relate, there are other issues in Docket 1153 involving alleged violations of the Shipping Act, 1916, such as prejudice and disadvantage to certain traffic; violations of tariffs; and violations of conference Agreement No. 8005, all of which have been briefed.

Therefore, the undersigned proposes to issue an initial decision in the immediate future disposing of the alleged violations referred to, for the following reasons:

1. If violations are found to exist they should be corrected without further delay. Conversely, if they do not exist, respondents are entitled to have the charges dismissed without further delay.

2. In view of the delay of over a year in action taken to enforce the subpoena; considering the further time which will be required to settle the matter of compliance therewith; and in view of the fact that still further time will be required for briefs and possibly hearings—depending upon whether the subpoena is enforced or is not enforced—it is concluded that the issues related to the subpoena should be reversed for a later supplemental decision when ripe therefor.

3. It is believed that disposition of the alleged violations now, on issues not related to the subpoena, would furnish no reasonable basis for a determination that the subpoenaed contracts are not material to the issues to which they are related.

A. L. Jordan
Presiding Examiner

Report and Order

FEDERAL MARITIME COMMISSION

No. 1153

**TRUCK AND LIGHTER LOADING AND UNLOADING
PRACTICES AT NEW YORK HARBOR**

Respondents' tariff provisions imposing direct transfer loading and unloading charges on truckers and lighter-men found to be contrary to section 17 of the Shipping Act, 1916.

Failure of respondents to establish and adhere to reasonable lighter and truck detention rules found to be in violation of section 16 First and an unreasonable practice under section 17 of the Shipping Act, 1916.

Failure of respondents to include in their tariff No. 2 rates assessed against lighters loaded and unloaded to piers found to be an unreasonable practice under section 17 of the Shipping Act, 1916.

Certain rules and regulations contained in respondents' tariffs No. 2 and No. 6 found to be in violation of section 16 first and contrary to section 17 of the Shipping Act, 1916.

Mark P. Schlefer, John Cunningham, Richard J. Gage, and Robert J. Nolan for respondents.

Herbert Burstein, Samuel B. Zinder, and Arthur Liberstein for intervener Empire State Highway Transportation Association, Inc.

Arthur Liberstein and Charles Landesman for intervener Wm. Spencer & Son Corporation.

Christopher E. Heckman for interveners Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corporation.

Thomas M. Knebel for intervener Middle Atlantic Conference.

James M. Henderson, Douglas W. Binns, and Jacob P. Billig for interveners Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervener Brooklyn Chamber of Commerce.

Leo A. Larkin, and Samuel Mandell for intervener The City of New York.

Thomas R. Matias, David N. Nissenberg and Robert J. Blackwell as Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, Chairman; John S. Patterson, Vice Chairman; Ashton C. Barrett, James V. Day, George H. Hearn, Commissioners)

This is an investigation instituted on our own motion, into certain practices of the New York Terminal Conference (respondent), in regard to the loading and unloading services its members provide for trucks and lighters at the various terminals in the port of New York.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Examiner A. L. Jordan.

The parties are identified in the appearances.

Facts

The New York Terminal Conference is an association of 22 steamship companies and terminal operators (all named individual respondents in this proceeding) who are engaged in or concerned with the loading and unloading of water-borne freight onto or from trucks and lighters at marine terminals in the port of Greater New York and vicinity.

The Conference operates under approved FMC Agreement No. 8005 which in Article 1 provides,

That they [respondents] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of loading and unloading of waterborne freight onto and from trucks, lighters and barges, and the service of storage of waterborne import freight on the pier (including the fixing of free time period), as aforesaid;

Respondents have filed tariffs with the Commission relating to lighter and truck loading and unloading. This proceeding is concerned with whether the terms and conditions of these tariffs meet the requirements of the agree-

ment itself and whether they are valid under the Shipping Act, 1916.

Lighters: There is a substantial amount of lighter traffic at the port of New York. Lighters are worked in two basic ways—to the pier and over-the-side. When worked to the pier, cargo is loaded to or unloaded from¹ the lighter with the pier as the place of immediate origin or destination of cargo. Over-the-side or direct transfer refers to the practice of mooring the lighter alongside the vessel with cargo passing directly between the two and never coming in contact with the pier.

Respondents' Lighterage Tariff No. 2 contains the rates, rules, and regulations applicable to loading lighters and barges alongside vessels moored at piers operated by respondents. This tariff covers only the above-mentioned over-the-side type of service and does not cover service to the pier. Respondents have no tariff for loading to the pier, and they rarely, provide loading services at the pier. Usually, when a lighter is to be worked at the pier, the service is performed by Wm. Spencer & Son (Spencer). Spencer is not a terminal operator, but is a stevedoring company specializing in handling lighter freight in New York Harbor. The vast bulk of the lighter-pier work in New York Harbor is done through Spencer. Spencer does not work under a tariff, all rates being negotiated.

The lighter may not, on arrival at the pier, demand to be worked in a certain manner. The terminal operator decides for his own convenience and necessities whether a particular shipment will be handled from the pier or over the side.

The lighters' access to the piers is controlled by the steamship companies which issue permits giving a range of two dates within which the lighters may arrive at the piers. This permit does not say whether the cargo will be

¹ Hereafter "load," "loading" or "loaded" includes "unload," "unloading" and "unloaded" unless the context requires otherwise.

handled over-the-side or to the pier because the order in which parcels of cargo are placed aboard the ship depends upon the time of arrival of the cargo at the terminal and the place of the particular parcel's port of discharge on the ship's itinerary. It has to be dealt with from time to time based on the ability of the vessel to receive the cargo into her holds. Under the permit issued by the ship, the terminal operator has complete control of the specific arrival time of the lighter and the actual time of loading.

Sometimes the terminal operator, for his own convenience, works a lighter over-the-side at night. This practice requires that lightermen pay overtime wages to the lighter captain and the lighterman's foreman who checks the cargo count with the terminal's checker. When a lighter is delayed for an indeterminable period, and the lighterman has to hire a lighter for another job in the place of a delayed one, reasonable rates are shown to be \$80 per day each for scows and covered barges and \$90 per day for stick lighters.

The size of the average lighter's cargo deck is 85-90 feet long by 30-35 feet wide. When working cargo over-the-side, if the terminal operator places the lighter alongside the ship's hatch so that the ship's hook lands in the center of the lighter's length, the drafts of cargo need be moved on the lighter's deck not more than 45 feet, and as the loading progresses that distance is shortened. Likewise, in an unloading process the distance cargo is moved grows from a few inches to not more than 45 feet. If, to speed its operations, the terminal operator decides to work cargo from two lighters into the same hatch, the ship's hook may fall at one end of each lighter. In that event, the greatest distance to be traveled on the lighter's deck is 90 feet with shortening of the distance in the same proportion as described in the first mentioned example.

When the terminal operator elects to receive the lighter's cargo on the pier, delivery is seldom accomplished at the point where it may be lifted directly from the pier into the

ship's hold. In such cases, therefore, after discharge to the pier the cargo must be moved from the point of rest on the pier to a point of rest on the ship's hold into which it is to be lifted.

Respondents' Lighterage Tariff No. 2, which provides the rates applicable to direct or over-the-side transfer, also contains the following provisions:

- (a) The service of loading lighters shall include stowage of cargo aboard lighters in a safe, reasonably efficient manner consistent with the custom and practice in the port of New York.
- (b) The service of unloading lighters shall include whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear.
- (c) The terminal operator shall supply all labor and equipment necessary to properly load or unload the lighter.
- (d) Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard to collection of lighterage detention charges from steamship companies.
- (e) There shall be no charge for the loading or unloading of single pieces of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad.

Trucks: In 1962, the Port of New York handled 13,901,942 long tons of general cargo, approximately 85 percent of which was moved to and from the piers by motor carriers. The remainder was moved by lighters and railroad cars. Consignors and consignees of the cargo dispatch trucks to the piers in order to deliver or receive their shipments.

Import freight is discharged from a vessel by stevedores (who generally are the respondents) and, thereafter, it is sorted and stacked at a point of rest on the pier and then

moved to a vehicle and placed thereon by the respondents. In the case of export freight, the same operation is performed prior to loading aboard a ship, except that the motor carrier has the option to unload the vehicle.

Generally speaking, upon arriving at a pier, the driver first receives a gate pass and thereafter his papers are checked. If found in good order, his vehicle will be placed on the pier in order to receive or deliver the cargo.

The record shows that there is congestion and excessive delay in truck loading at the piers, that normal delays run from one to several hours, and that the trucks begin arriving at the piers more than one hour before they open in order to offset the delay they will experience. One trucker offered the following example: He arrived at a pier at about 7:00 a.m. for a load of hams (1,480 cases); was routed at about 8:00 a.m.; started work at about 9:30 a.m.; at about 4:30 p.m. when still not loaded was told that all were going home; and about 5:30 p.m. the terminal decided to finish loading, which it did; and the truck got off the pier at about 9:00 p.m.

Delay is perhaps the greatest single problem involving truck traffic. Witness after witness testified to the inconvenience and expense to motor carriers resulting from the chronic delay of vehicles at the piers. These delays are a serious problem to the motor carriers because the inefficient use of equipment and labor tends to increase operating costs, thus affecting their ability to compete with other modes of transportation. They are a problem to shippers and receivers because the increased costs are necessarily passed on to them in the form of higher rates.

The Conference has on file Truck Loading and Unloading Tariff No. 6, F.M.C.-T. No. 7 (Tariff No. 6) naming rates, rules and regulations for loading and unloading trucks at piers operated by the Conference members. On July 19, 1963, the Conference issued a First Revised Page 3 to Tariff No. 6, Item 3, 2, A, effective August 19, 1963, which

amended the definition of truck unloading to provide that such service "shall mean the service of removing cargo from the body of the truck to the dock, vessel or other terminal facility designated by the Terminal Operator...." By this amendment the tariff provision for truck unloading was modified to delete reference to the place of rest and to expressly include the vessel as the place of immediate destination. The purpose of the amendment is to permit respondents to assess truck unloading charges on direct movement of cargo between truck and vessel. Truckers have protected the practice on the ground that such movement is not properly "truck unloading," since "place of rest" cannot be construed as the vessel itself. Other provisions of Tariff No. 6 at issue here are:

1. *Item 16.* The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.
2. *Item 3, 1, B.* The loading and stowing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck.
3. *Item 10.* A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion of the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator (3 o'clock rule).
4. *Item 11.* When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall proceed at a rate of five tons (10,000 pounds) per hour. When this rate is not maintained, a penalty charge of \$1.00 for each quarter hour or fraction thereof shall be assessed for the excessive time (10,000 pound rule).

Discussion

The primary issues to be resolved here are: (1) whether the imposition of a charge (as contained in Lighterage Tariff No. 2 and Truck Tariff No. 6) for direct or over-the-side transfer service is sanctioned by the conference agreement, and (2) whether the imposition of such a charge is an unjust or unreasonable practice under Section 17 of the Shipping Act (Act).²

The Examiner found that the assessment of such charges was not authorized by the conference agreement and further that since the direct transfer service is entirely a stevedoring function, which is paid for by the vessel, the imposition of another charge on the lighter or truck would result in the payment of a double charge for the same service rendering the practice unjust and unreasonable under section 17 of the Act.

Respondents except to each of the Examiner's findings regarding the direct transfer charges contained in Lighterage Tariff No. 2. The exceptions are:

1. The natural meaning of the words employed in Agreement 8005³ is that it covers the loading and unloading of cargo onto and from lighters wherever lo-

² Section 17 provides:

"... Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulation and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

³ Article 1 of Agreement 8005 provides:

"That they [respondents] shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of loading and unloading of waterborne freight onto and from trucks, lighters and barges, and the service of storage of waterborne import freight on the pier (including the fixing of free time period), as aforesaid;"

cated. The Examiner states nothing to support his finding to the contrary.

2. Since it can be shown that the direct transfer charge does not result in a double charge, there is no unjust or unreasonable practice and the Examiner's finding to the contrary should be rejected.

Respondent's first exception is well taken. The Agreement provision authorizes conference ratemaking "with respect to the services of loading and unloading waterborne freight onto and from . . . lighters and barges . . ." This provision is silent concerning the location of such lighters and barges. While the Examiner found that the Agreement referred only to services "on the pier," the words "on the pier" do appear in Article 1 of the Agreement, but by their context clearly refer only to the provision dealing with storage and not to the provision covering loading or unloading lighters.⁴ We must disagree with the Examiner's conclusion here since the natural meaning of the words employed is that the agreement covers the loading and unloading of cargo onto and from lighters, wherever located. We therefore find that Article 1 of Agreement 8005 does authorize a charge for direct transfer service from lighter to vessel.

There remains the question of whether the imposition of such a charge, although not prohibited by the conference agreement, is nevertheless an unjust and unreasonable practice under section 17 of the Act. The Examiner so found and we agree.

Respondents contend that the direct transfer charge is necessitated by the added expense entailed in such services. Some of the added expenses in direct loading of lighters, as against working cargo to or from the pier, stated by respondents are: lower productivity, less working space,

⁴ ". . . with respect to . . . the service of storage of waterborne import freight on the pier . . ."

necessity to break cargo out of stow on the lighter resulting in slow operations, less utility of mechanical equipment, re-rigging of gear for working over-the-side (some \$80) not compensated in the stevedoring rate, idle gang time while uncovering the hatch on hatch lighters, and shifting lighters.

Respondents also attack the Examiner's finding that the direct transfer charge results in double compensation for the same service. In finding that it did, the Examiner reasoned that the loading and unloading services upon which the charge is imposed were stevedoring functions performed by the terminal operators, which were paid for by the ocean carrier.

The Examiner would define stevedoring, in the case of import cargo, as the process of breaking cargo out of stow in the ship's hold, lifting the cargo from the vessel and depositing it on the pier's stringpiece and then carting it by hilos to the place of rest designated by the stevedore. In the case of export cargo the process is reversed beginning at place of rest and ending in vessel's hold.

By custom of the Port, the ship assumes the responsibility for the performance of this stevedoring function. The actual work may be accomplished by the carrier itself but in New York it is usually done for them by terminal operators (respondents) who lease the piers. When respondents do perform stevedoring functions, they are paid for by the ship. On this basis the Examiner concluded that any charge to the lighterman for the same service would be unjust and unreasonable since it results in a double charge.

We think the Examiner's conclusion here was correct. In direct transfer, the lighter deck replaces the pier as the place of rest. The service involved is the movement of cargo between lighter deck and vessel or between place of rest and vessel. This is clearly a stevedoring service which is performed by the respondents but paid for by the ship.

Stevedoring is done for the account of the steamship company and the stevedore is paid for this service by the ship. Traditionally, the ship has the responsibility of moving export cargo between the place of rest on the dock to the ship's tackle and vice versa when import cargo is transferred. In the absence of a special handling charge, the freight rate will include the stevedoring charge.⁵ Since respondents' costs or expenses of direct transfer are paid for by the ship, any charge for the direct transfer service under Lighterage Tariff No. 2 results in collecting twice for the performance of a single service—the imposition of a double charge.

Respondents attempt to justify the loading and unloading charges on the basis of additional expenses allegedly incurred by them for such direct transfer services. The record does not support the contention that such additional expenses do in fact exist. Respondents' supporting exhibit included a cost analysis which involved a strike period and, accordingly, is unsatisfactory. The exhibit also shows that certain of the costs are pure estimates without any proper foundation for them. Lightermen interveners also showed that several of the alleged extra expenses are in fact compensated for and included in the charge made to the steamship company.

Respondents rely on *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939), as support for their argument that a separate charge for movement between place of rest and ship's hook is proper. The *Boswell* case stands for the principle that a separate charge for such movement can be assessed by vessel against cargo when ". . . it is not shown that the published tackle-to-tackle rates included any compensation for that service . . ." 2 U.S.M.C. at 101. The issue before us is not whether the vessel can assess such a separate charge, but

⁵ See *Sun-Maid Raisin Growers Ass'n v. United States*, 33 F. Supp. 959, 961 (N.D. Cal. 1940), *aff'd* 312 U.S. 667 (1940).

is whether the terminal can separately charge the lighter for a service which is included in the stevedoring service provided by terminal to vessel. The two situations are totally distinguishable and accordingly *Boswell* is inapplicable here.

Respondents do not except to the Examiner's finding regarding truck unloading charges contained in Truck Tariff No. 6. Such direct transfer charge resulted from an amendment of the tariff's truck unloading definition to include "vessel" as place of immediate destination in the unloading process. The Examiner applied the same arguments concerning division of responsibilities between vessel and cargo and concluded that direct transfer unloading was a stevedoring function paid for by the vessel and a double charge would result if the trucker were also charged for this same service. Accordingly, the Examiner ruled that the use of the term "vessel" should be deleted from the tariff, thereby eliminating the charge to the trucker for direct transfer. Respondents have not excepted to this finding and have in fact made the suggested deletion in a new tariff filed with the Commission (Truck Loading and Unloading Tariff No. 7).

Detention. Respondents' exceptions also raise the issues of whether the respondents' failure to include detention rules in their truck and lighter tariffs is unjust and unreasonable and whether respondents presently give an unreasonable preference to lighter traffic over motor vehicle traffic in regard to detention payments in violation of section 16 First of the Act.

As before stated, the record indicates many instances regarding both lighter and truck detention. In the case of lighters, delay can usually be attributed to the terminal operators in that they determine in what manner and with what priority a certain lighter will be loaded or unloaded.

Vessels are worked by a plan in which stowage, itinerary, vessel trim or balance and other such matters are a factor.

Thus, vessel loading and discharging are in such order and in such amounts as suits the convenience of the vessel and the stevedore working the vessels. For the lighterman whose lighter is being worked over-the-side, the selection process is important as his equipment and his employees must stand by for the time it takes to complete the work, usually to his cost detriment.

Respondents argue that lighter detention is often caused by the steamship company and it is proper to look to them for detention payments. The record shows that the lightermen do have detention agreements with some steamship companies, but that collection has been unsatisfactory.

Hearing Counsel is of the opinion that it is the terminal who assesses charges against the lighterman, and it is the terminal with whom and through whom the lighterman works during the entire transfer process; that for stevedoring purposes, the terminal stands in the place of the ocean carrier by assuming the carrier's traditional obligation of loading and unloading; that even if detention is caused by the carrier, it is only natural to look to the terminal for redress; that the lighterman cannot be expected to seek out fault—this being a matter between the carrier and its contractor the terminal; that the terminal is the only proper party to assume responsibility for detention; and that the problem could easily be handled through the adoption of a suitable detention rule in the lighterage tariff.

Inasmuch as the lighterman experiences detention of his craft for reasons residing entirely within the stevedoring process, it is only proper that he be compensated for any extraordinary costs which result from unusual delay. We agree with the Examiner's conclusion that it is unjust and unreasonable for respondents to fail to adopt a just and reasonable lighter detention rule or regulation in their lighterage tariff, and failure to do so for the future will be, as it has been in the past, contrary to section 17 of the Act. The assumption by the terminal operator of the

carrier's traditional obligation of loading and unloading of necessity carries with it the responsibility for ensuring that just and reasonable rules govern the performance of the obligation.

Truck detention is a more complex problem. It is virtually impossible to determine responsibility for truck delay because of the many and varied factors which may or do contribute toward a particular instance of delay.

The truckers attribute delay primarily to the terminal operators because of insufficient labor and/or equipment, and inadequate control of labor.

Hearing Counsel feel that the terminal operators can be held responsible to some extent for condition of piers and congestion resulting therefrom. Hearing Counsel also recognize other factors causing delay, e.g., the insistence of shippers to wait until the day of sailing to deliver export cargo; the tendency of shippers to wait until the last day of free time to pick up import cargo; presentation by shippers of improper documentations at piers; and failure of truckers to be with their trucks when they are called for service.

Respondents assert still other reasons for delay: not all piers are built to handle peak loads, inevitable factors such as strikes, slowdowns or refusals to work overtime, and bad weather conditions.

The Examiner concluded that irrespective of the causes of delay the "truckmen have a right to expect handling as expeditiously as possible, and they have a right to get better handling than they have had in many specific cases."

The Examiner then adopted Hearing Counsel's suggestion that respondents be required to include a reasonable detention rule in their Tariff No. 6, with the reservation that because of the many reasons for delay and because delays occur for which the respondents are not at fault, though most of the delays are within the control of respond-

ents, a reasonable detention rule for trucks must acknowledge causation and exonerate the terminal for delays which it cannot control. The Examiner concluded that respondents' failure to adopt such a detention rule would be an unreasonable practice under section 17 of the Act.

We agree with the Examiner. It is neither just nor reasonable for respondents to disclaim liability for all delays and their attempt to do so was invalid under section 17. Whatever may be difficulties in drafting a detention rule which takes into account those causes of delay which are beyond respondents' control, the truckers have a right to the rule, and section 17 demands it.

While we look with favor on the attempts of the parties to iron out their differences amicably, we cannot agree with respondents that their attempts to work out an "appointment system" with the truckers obviate the need for the rule. Even if respondents are correct in their assertion that an "appointment system" will solve practically all of the problems of delay, the need for the rule remains. The issue here is what the trucker may reasonably expect as redress when delays occur, not what may be done to remove the causes of delay. The latter is another problem entirely and while we are vitally interested in any attempts to eliminate or reduce delay, the validity of these attempts is not at issue here. Moreover, the establishment of the system alone does not deal with the problem of what the rights of the respective parties are if the system proves unworkable or when it breaks down.

Accordingly, we adopt as our own the Examiner's finding that respondents should delete Item 16 (which relieves them of all liability for detention) from Tariff No. 6 and insert a reasonable detention rule therein which will compensate the truckers for unusual truck delays caused by or under the control of the terminals. Respondents' disclaimer of all liability for delay and its failure to establish

and apply such truck detention rule constitute unjust and unreasonable practices under section 17 of the Act.

We also agree with the Examiner's finding that respondents presently give an unreasonable preference to lighter traffic over motor vehicle traffic in regard to detention payments, in violation of section 16 First of the Act.⁶

A comparison of the detention provisions of Tariff No. 6 and Tariff No. 2 reveals the preference given lighter traffic in this respect. Item 16 of Tariff No. 6 provides:

ITEM 16. DELAY TO MOTOR VEHICLES

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

Tariff No. 2 contains a provision reading:

Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard collection of lighterage detention charges from steamship companies.

On exception to the Examiner's finding, respondents point out that the provision in Tariff No. 2 does not refer to detention payments by terminal operators, but refers only to payments by steamship companies. Respondents feel that this removes the basis for any finding of preference since it is true that respondents do not pay detention to lighters and accordingly they cannot be accused of preferring lighters over trucks.

⁶ Section 16 provides:

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Respondents fail to recognize that the preference and prejudice need not arise from the actual payment to one as opposed to the other, but such preference and prejudice arise from the mere presence of the varying provisions in the two tariffs. The tariff No. 6 provision flatly states respondents will have no responsibility for detention payments for trucks. The Tariff No. 2 provision negatively states that respondents will not interfere with any claims for detention lightermen may hold against the steamship company. It is conceivable that truckers would also have detention claims against the steamship company, especially in the case of direct transfer when the terminal operator is acting as agent for the steamship company. By failing to recognize the right for truckers to collect detention and by expressly recognizing such rights for lightermen, respondents' tariffs give unreasonable preference to lighter traffic over truck traffic in violation of section 16 First of the Act.

Lighter to Pier Operations. The Examiner finds respondents' failure to include in their Tariff No. 2 rates assessed against lighters loaded and unloaded to piers (as distinguished from alongside vessels) to be a violation of sections 15 and 17 of the Act and of Article 4 of Agreement No. 8005, as amended.

Respondents admit that they do not include such rates in their tariff, but except to the Examiner's finding by asserting that they do not perform such services and therefore cannot be expected to have a tariff covering such services.

As noted above, if a lighter is to be loaded at the pier, the service is usually provided by Spencer who performs such service on negotiated rates. Spencer also excepts to the Examiner's decision which imposes upon respondents the duty to file such a tariff. Spencer is afraid that respondents will set their loading and unloading rates at such a low level so as to force Spencer out of business.

Our review of the record indicates that respondents have in the past and still do on some occasions perform such services. The president of International Terminal Operating Company (a respondent) testified that "we do not handle lighters to the dock *as a general rule*. In fact *hardly* any instance of that occurs."⁷ His statements leave the inference that there are occasions on which such services are performed. Respondents perform such services on negotiated rates, since they have no tariff covering them.

We conclude that to the extent such services are performed respondents are required to have a published tariff to inform the potential recipients of such services of the exact charges to be expected. Negotiated rates are unsatisfactory and the Examiner so found, relying on our decision in Docket 800, where we dealt with a tariff provision for negotiated rates:

The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know what a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.⁸

Concerning Spencer's exception, we cannot anticipate that the terminal operators will attempt to drive Spencer

⁷ Hearing Transcript, p. 300, emphasis supplied.

⁸ *Empire State H'w'y Transp. Ass'n v. American Export Lines*, 5 F.M.B. 565 (1959) at page 590.

from the market by establishing extremely low rates. Spencer's position has no effect on the mandates of the Shipping Act which requires respondents to make clear in their tariff what the uniform charge for the service will be. Accordingly, we find the failure of respondents to establish and publish in their tariffs the rates at which they will perform lighter to pier service constitutes an unjust and unreasonable practice under section 17.

Railroad heavy-lift freight rules.

Respondents' Tariff No. 2 contains a provision to the effect that there will be no charge for the loading and unloading of heavy lift freight received from or destined to a railroad.⁹ The Examiner found that selective treatment is given heavy lift cargo originating with or destined to railroad lighters and results in discrimination against private lighter traffic in violation of sections 16 First and 17 of the Act.

Respondents except to this finding and claim that it should be rejected since no evidence was adduced on the point and because the private lightermen evince indifference.

Neither contention of respondents is valid. The evidence shows that respondents have performed free heavy lift services for railroads. This was admitted by respondents' witness. The evidence further shows that respondents perform no similar free services for private lightermen. The lightermen do not evince indifference as is evidenced from their briefs and from their statements at oral argument. Moreover, the degree of concern of the lightermen is not determinative of the validity of the practice. The Examiner's finding should be upheld.

⁹ See paragraph (e), page 4 for full text of this provision.

Three O'clock Rule

Item 10 of Tariff No. 6 provides:

A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator.

The Examiner found that this rule was an unreasonable practice under section 17 of the Act. His finding was based on the fact that the last sentence of the rule would exclude truckers from the guarantees of the rule if they elected to perform their own unloading.

Respondents do not except to this finding, but propose to delete the rule, upon the institution of an appointment system.

The Examiner correctly found the rule to be unreasonable. The present rule does not guarantee a trucker who performs his own unloading that he will be serviced (furnished a checker and hilo) to completion. Thus, the rule can be used as a means to compel the trucker to use the unloading services of the terminal for which a charge would be assessed. The tariff purports to allow the trucker to perform unloading himself. This cannot practically be accomplished under the present 3 o'clock rule. The rule constitutes an unjust and unreasonable practice under section 17 of the Act and should be amended to extend application thereof to cases where the trucker unloads his own truck.

Ten Thousand Pound Rule

Item 11 of Tariff No. 6 provides:

When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall pro-

ceed at a rate of five tons (10,000 pounds) per hour. When this rate is not maintained a penalty charge of \$1.00 for each quarter hour or fraction thereof shall be assessed for the excessive time.

The Examiner would require the deletion of this rule because in many cases it is not being applied by respondents, and because it is meant to be applied only when trucks are unloaded without the services of the terminal operator.

We would further condemn the rule because it is incapable of uniform application to all types of commodities. Respondents admitted that 10,000 pounds per hour is much too much to ask on some commodities. Different loading characteristics of varying types of cargo make uniform application impossible. For this reason and for those of the Examiner, stated above, the rule is unreasonable under section 17 of the Act and should be deleted from the tariff.

No party has taken exception to the Examiner's finding on this subject. Respondents propose to establish a new rule in this respect upon the institution of an appointment system. It would be premature to comment on any such proposal in this report.

Shippers' Requests and Complaints

Respondents except to the Examiner's finding that they have failed to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints as required by section 15. At the time of the Examiner's decision, respondents had not adopted such procedures. We will take official notice, however, that subsequent to the Examiner's decision respondents have instituted such procedures and filed a description thereof with the Commission. These procedures are set forth at pages 12 and 13 of respondents' truck loading and unloading tariff No. 7 (FMC-T No. 8), and are as follows:

ITEM 20. DISPOSITION OF REQUESTS AND COMPLAINTS

- A. Shippers' requests and complaints (as said phrase is defined by the Federal Maritime Commission) may be made by any shipper by filing a statement thereof with the New York Terminal Conference, 17 Battery Place, New York, New York 10004. The said statement shall be submitted promptly to the Tariff Committee and to each member of the Conference.
- B. Said statements shall be considered by the Tariff Committee at its next meeting. Action need not be restricted to the exact scope of such statement of request or complaint but may include other points or recommendations varying from, but directly or indirectly related thereto.
- C. Prompt written notice shall be given to the proponent or complainant of the docketing of his statement and of the date of the meeting of the Tariff Committee at which it will be considered. If such proponent or complainant desires to be heard at said meeting, he shall make request upon the Conference in advance of the meeting.
- D. The decision of the Tariff Committee shall be announced promptly, in writing, to the proponent or complainant, and members of the Conference. The decision of the Tariff Committee shall be final subject to appeal to the entire Conference membership within sixty (60) days after notification of the decision.
- E. If an appeal is taken to the Conference, the Conference shall hear the appeal promptly and shall advise promptly, in writing, the proponent or complainant of the decision.

Accordingly, we find that respondents have conformed with the requirements of section 15 in this respect.

Trucker's Exceptions

Intervener, Empire State Highway Transportation Association Inc. (Empire), has excepted to the Initial Decision in the following respects:

1. The Examiner having found violations of the Act failed to recommend that the Commission withdraw approval of the Agreement or that the Commission grant other effective relief.
2. The Examiner improperly concluded that this was not a rate case.
3. The Examiner failed to conclude that the cost of truck loading and unloading should be borne by steamship companies.
4. The Examiner erroneously concluded that certain rules and regulations of Tariff No. 6 and practices thereunder did not violate the Act as contended by Empire.

The violation of the Act to which Empire refers in its first exception is respondents' failure to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. Since respondents have complied with the requirements, Empire's plea for disapproval of the conference agreement is rejected.

Empire's exception to the Examiner's failure to consider the level of rates in this case is rejected. Empire contends this is a "rate case" because of the references to rates and charges which are contained in paragraphs (5) and (7) of the Order initiating this proceeding. These paragraphs read as follows:

- (5) Whether any of the rates, charges, rules or regulations contained in the tariffs filed with the Commission by the parties to Agreement No. 8005 result

in any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

(7) Whether any of the rates, rules, regulations or practices of the respondents are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or in any manner violate the Shipping Act, 1916.

Paragraph (5) raises no issue of reasonableness of rates. This paragraph is limited to section 16 First questions of unlawful preference or prejudice.

Paragraph (7) poses the question whether respondents' rates operate to the detriment of the commerce of the United States, but this is not the normal and usual "reasonableness" criterion used when considering levels of rates.

Hearing Counsel accurately point out that in Docket 65-39 Empire by its own complaint has initiated proceedings on this very issue against these same respondents.

A determination of the rate question is properly before us in Docket 65-39 and is not a part of this proceeding.

Empire's third exception is also rejected. Empire would have the steamship companies pay the charges for truck loading and unloading. Currently such charges are paid by the truckers. Empire reasons that if the steamship companies were required to bear these charges they would develop a direct interest in the loading and unloading services and accordingly they would proceed to remedy the deplorable conditions at the Port of New York which impair efficient and economical truck loading and unloading services. Empire also contends that truck loading and

unloading is but an incidental fact of the continuous operation for the transfer of cargo from the ship to the shore, and that this "terminal" function of transferring cargo from place of rest to the truck should not be separated from the "stevedoring" process paid for by the vessel.

Middle Atlantic Conference, another trucker intervenor, also excepts to the Examiner's finding on this point. Middle Atlantic is of the opinion that the decision on this issue should have been deferred until the litigation to obtain enforcement of subpoenas against respondents is settled. Middle Atlantic feels that until such contracts are produced it is impossible to decide which services are being performed by respondents for the account of the steamship companies and which are being rendered on behalf of the shipper.¹⁰

We agree with the Examiner that the record does not adequately support or justify a requirement that the cost of truck loading and unloading be borne by the steamship companies.

To hold that the steamship company must absorb this charge would revolutionize the way of doing business in the Port of New York. We see no reason to overturn such a long established custom in the absence of a showing that the present custom operates in some way that violates the Act, or is detrimental to commerce or is contrary to our public interest. No such showing has been made. Never-

¹⁰ At the hearing Empire subpoenaed the respondents to produce certain terminal and stevedoring contracts. The subpoena has not yet been complied with but is now before the courts for enforcement on request of the Commission. The Examiner found that the only issue to which the subpoenaed contracts relate is the question of whether the terminal operators have any agreements with the ocean carriers whereby part of the revenue collected from lighter operators is to be refunded to the carriers. The Examiner reserved disposition of this issue for a later decision subsequent to respondents' compliance with the subpoenas. We similarly reserve disposition of the refund of revenue issue but find no necessity to reserve decision on the question of who should bear the cost of truck loading and unloading.

in any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

(7) Whether any of the rates, rules, regulations or practices of the respondents are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or in any manner violate the Shipping Act, 1916.

Paragraph (5) raises no issue of reasonableness of rates. This paragraph is limited to section 16 First questions of unlawful preference or prejudice.

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To hold that the steamship company must absorb this charge would revolutionize the way of doing business in the Port of New York. We see no reason to overturn such a long established custom in the absence of a showing that the present custom operates in some way that violates the Act, or is detrimental to commerce or is contrary to our public interest. No such showing has been made. Never-

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theless, the proposal does augur possible lower total costs, possible increased efficiency (by reason of the fact that carriers might more carefully oversee the operation), and make available to American exporters a pre-determinable assessment of their export costs through an inspection of steamship tariffs. We will therefore have our staff informally investigate the ramifications of this proposal.

Moreover, such a result would disregard the division of responsibilities between vessel and cargo already discussed in connection with the direct transfer charge, *supra*. The opinion of the Court of Appeals for the District of Columbia Circuit in *American President Lines, Ltd. v. Federal Maritime Board*, 317 F. 2d 887 (1962), further supports this conclusion and indicates that the common law duty of a common carrier does not extend beyond placing the goods at a place of rest on the pier accessible to the consignee. The court stated at page 888:

The work of unloading and putting the cargo on the dock is done on behalf of the carrier by longshoremen, who are laborers skilled in this sort of thing, or by stevedoring companies under contract with the carriers, these stevedores employing longshoremen. There is not now, and does not appear ever to have been, absent a special contract, any obligation on the part of the carriers to put such cargo actually into the hands of consignees, as by putting it into trucks and hauling it to the consignees' places of business.

Finally, the steamship companies who would be adversely affected by such a result are not parties to this proceeding and have not had an opportunity to be heard.

Empire's final exception takes the Examiner to task for failing to make findings on the subjects of safety, minimum charges, overtime charges, palletizing of cargo, weighing of cargo, and credit arrangements. Tariff No. 6 contains provisions relating to each of these points.

Empire has offered no additional enlightenment on these points, and a review of the record confirms the Examiner's finding that the evidence is inadequate for making any findings or conclusions on these matters.

Empire sought also to persuade the Commission to require the institution of an independent Port Coordinator's Office in the Port of New York. Empire envisions a Port Coordinator which would supervise the movement of freight in the Port of New York, and which would act as a forum for all parties to seek redress of their complaints, and hopefully remedy many of the present problems.

Assuming that the Commission has the authority to direct the establishment of such an office, we still are unable to determine, from this record, whether such an office would be either helpful or necessary. Accordingly, we cannot order the establishment of a Port Coordinator's Office.

An appropriate order will be entered.

Thomas Lisi
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES
AT NEW YORK HARBOR

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and

conclusions thereon, which Report is hereby referred to and made a part hereof;

IT IS ORDERED, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violations of section 16 First and section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), herein found to have been committed by respondents; and

IT IS FURTHER ORDERED, That respondents be, and they are hereby required, within 45 days after the date of service of this order to modify the provisions of their Lighterage Tariff No. 2 and their Truck Tariff No. 6, in a manner consistent with our report herein; and

IT IS FURTHER ORDERED, That the proceedings in Docket 1153 are hereby discontinued except for that portion thereof upon which the Examiner reserved decision pending resolution of a related subpoena enforcement proceeding currently before the courts.

By the Commission.

Thomas Lisi
Secretary

(SEAL)

Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., AMERICAN STEVEDORES, INC., BAY RIDGE OPERATING CO., INC., CHILEAN LINE, INC., GRACE LINE, INC., INTERNATIONAL TERMINAL OPERATING CO., INC., MAHER STEVEDORING CO., INC., MARRA BROS., INC., MAUDE/JAMES, INC., JOHN W. MCGRATH CORPORATION, NACIREMA OPERATING CO., INC., NORTHEAST MARINE TERMINAL CO., INC., NORWEGIAN AMERICAN LINE AGENCY, INC., PIONEER TERMINAL CORPORATION, PITTSSTON STEVEDORING CORPORATION, RELIABLE MARINE SERVICE CO., INC., UNIVERSAL TERMINAL & STEVEDORING CORPORATION, *Petitioners*

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Respondents*

PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL MARITIME COMMISSION

I. INTRODUCTION

This is a petition to review and set aside portions of a final order and report (referred to collectively as "Order") of the Federal Maritime Commission ("Commission") served May 16, 1966. A copy of the Order is attached. Petitioners here (respondents before the Commission) are the members of the New York Terminal Conference, an association of companies who operate terminal pier facilities in New York Harbor in connection with common carriers by water. The Commission held that the petitioners violated Section 16 First and Section 17 of the Shipping Act, 1916 (46 U.S.C. §§ 815, 816) and

ordered them to alter a number of their tariff provisions relating to the loading and unloading of trucks and lighters (boats used to transport cargo between a vessel and the shore).

The Commission's Order forces drastic changes in the business operations of the individual terminal operators belonging to the Conference, including changes in their rules, regulations and practices which determine the cost for various terminal services. Some of the changes ordered by the Commission have already been, or will be, put into effect by petitioners. Other portions of the Order, however, are arbitrary in that they are unwarranted and unsupported by the record compiled in the Commission's investigation and, in addition, constitute an exercise of powers beyond those given the Commission by any applicable statute. Further, they are arbitrary and unreasonable in terms of their consequences and practical effect upon the immense, complex and vital business of importing and exporting goods to and from the Port of New York. Petitioners seek by this petition to have these portions reviewed and, upon review, set aside.

II. JURISDICTION AND VENUE

This court is given jurisdiction to review the action of the Commission by the Judicial Review Act of 1950, 5 U.S.C. § 1031, *et seq.* The District of Columbia is proper venue, 5 U.S.C. § 1033.

III. GROUNDS FOR RELIEF

Set forth below are the specific portions of the Order and findings to which petitioners object and a brief statement of the grounds for objection. For purposes of clarity these portions of the Order are divided between those concerning loading and unloading trucks and those concerning loading and unloading lighters and are not considered in the same sequence followed in the Order itself.

A. Issues Relating to Truck Loading and Unloading

1. *Truck Detention.* The Commission ordered petitioners to include in their truck tariff a "detention rule" whereby they must "compensate the truckers for unusual truck delays caused by or under the control of the terminals" (Order, p. 13). However, the *finding* in the Order is that it is "virtually impossible" to determine the causes of truck delay (Order, p. 12). The Commission's determination in this respect is therefore arbitrary and capricious. No statute empowers the Commission to order respondents to pay money to the truckers. The Order, therefore, exceeds, and is in abuse of, powers granted the Commission under the Shipping Act, 1916.

2. *The Three O'Clock Rule.* Truck Tariff No. 6 contains the following rule:

"A truck in line to receive or discharge cargo by 3 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator."

The Commission's Order apparently directs petitioners to modify the three o'clock rule so that it will apply even where the truck driver unloads the truck "without the services of the terminal operator." The Commission's Order in this regard is arbitrary. It would obligate the terminal operator to furnish hilo equipment and terminal labor for a potentially indefinite period of time no matter how late the hour and to handle the unloaded cargo on an overtime basis without extra compensation although the trucker and not the terminal operator controls the speed at which the truck is unloaded.

The Order is arbitrary for the further reason that it fails to recognize that petitioners' Truck Tariff No. 7, which the Commission discussed in its Order, establishes an appointment system whereby truckers may reserve a time certain for loading or unloading their truck. The new three o'clock rule in Truck Tariff No. 7 is limited to trucks which do not make appointments and obligates the terminal operator to service such trucks only until 5:00 p.m. or until the time when the last appointment truck is finished. The Commission's Order would undermine this painfully evolved appointment system in that a truck failing to appear for an appointment could nonetheless insist on servicing to completion if it merely appeared before 3:00 p.m. Such an order is on its face arbitrary.

3. *The Ten Thousand Pound Rule.* The Commission ordered petitioners to delete the provision in Truck Tariff No. 6 that if the terminal operator's employees are not performing the unloading the truck shall be unloaded at the rate of at least 10,000 pounds per hour to avoid imposition of extra charges. The record does not support this finding.

B. *Lighter Loading and Unloading*

1. *Working Lighters Over the Side.* The Commission's Order prohibits petitioners from assessing the charges in Lighterage Tariff No. 2 when lighter cargo is handled directly to or from a vessel (over-the-side handling) rather than to or from the pier. But in handling lighter cargo over the side petitioners are discharging the lighterman's obligation to load or unload his lighter; petitioners should be compensated therefor. The Commission's Order directing petitioners to cancel Lighterage Tariff No. 2 is therefore arbitrary and beyond its statutory power.

Furthermore, the evidence of record showed that costs were incurred by petitioners in addition to normal stevedoring costs for performing over-the-side handling. Since

the Commission did not find that the charges in Lighterage Tariff No. 2 were unreasonable in amount for the service performed, its Order is unsupported by the record or by its findings.

2. *On-Pier Lighter Loading.* The Commission ordered petitioners to establish tariff schedules and rates covering the loading and unloading of lighters to or from the pier. No statute requires such a tariff. Nor can the requirement be legally established administratively in the absence of an agreement among petitioners as to rates, rules and regulations covering such service; there is no evidence of any such agreement and of course no finding on the point.

In addition, petitioners do not hold themselves out to perform the services which would be covered by such a tariff; and the Commission is without legal authority to compel petitioners to engage in a business which they are not now in.

It is furthermore arbitrary and capricious because of the Commission's refusal to recognize on the basis of the unqualified and undisputed representation to it that there is no possible way that petitioners can comply with this Order without either violating exclusive bargaining agreements or precipitating a strike of the entire Port of New York.

3. *Lighter Delay.* The Commission determined that the petitioners must include in their lighterage tariff (which elsewhere the Commission orders petitioners to cancel in its entirety) a provision whereby lighter companies may present claims for lighter detention for payment by petitioners. The tariff is a tariff of charges, and the Commission has no statutory power to require petitioners to make any payments for detention of lighters.

In addition, the evidence shows that the steamship companies pay compensation for detention to the lighters; there is no contrary evidence. It is therefore arbitrary

and capricious to compel petitioners also to pay such detention claims.

4. *Disclaimers of Liability for Delay.* The Commission ordered petitioners to eliminate the difference in language existing between the disclaimers of liability for delay in Truck Tariff No. 6 on the one hand and the comparable language in the Lighterage Tariff on the other. Elsewhere, however, the Commission directed petitioners to include differing detention rules in the truck and lighter tariffs. The Order in any case is wholly unclear. Insofar as it purports to state that detention rules must be identical for trucks and lighters, it is unsupported by any finding in the Order or evidence in the record. Insofar as it directs petitioners to adopt a disclaimer provision for lighters identical to the one set forth in Truck Tariff No. 6 with regard to trucks, petitioners agree to do this.

C. *Vagueness*

The Order is unreasonable and unenforceable for vagueness; it cannot be reasonably understood by petitioners with respect to the directives purportedly given to them. Moreover, the findings and reasons upon which said directives purport to be based are insufficient to enable the court to determine what the Commission did.

D. *Due Process and the Administrative Procedure Act*

The Order is violative of due process and the procedural requirements of Section 5(c) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1004(c) in that:

1. At the time he presided over and conducted the investigative hearings in the administrative proceeding in Docket 1153 and thereafter, Examiner Jordan was responsible to, and subject to the supervision and direction of the managing director of the Commission, who was and is an officer and employee of the Commission engaged

in the performance of investigative and prosecuting functions for the Commission.

2. Officers, employees, and agents of the Commission, who had been engaged in the performance of investigative and prosecuting functions for the Commission in the case under review, namely, the General Counsel and two employees of the Bureau of Compliance, participated and advised, (other than as witnesses or counsel in the public proceedings) in the Commission's review of the Hearing Examiner's initial decision and the Commission's subsequent decision approving and adopting its order herein. As a further and additional violation of and the requirements of Section 5(c) of the Administrative Procedure Act, petitioners' rights to due process, the General Counsel and the two employees of the Bureau of Compliance were also at the time of said participation under the control, direction and supervision of the managing director, who had also personally engaged in prosecuting and investigatory functions for the Commission in the case under review.

3. In the course of the proceedings below, the hearing examiner participated in improper *ex parte* discussions in violation of Section 5(c) of the Administrative Procedure Act and in violation of petitioners' constitutional rights.

E. Rule Making

The Commission's order, if allowed to become effective, will force petitioners to publish new tariffs differing from those now in effect in a number of material respects; the order constitutes a determination that there should be new rules covering loading and unloading practices and procedures in New York Harbor. As a consequence, the order is illegal and void for failure to follow the rule-making provisions set forth in Section 4 of the Administrative Procedure Act.

RELIEF SOUGHT

Petitioners respectfully pray that this Court:

1. Find that the Commission erred in the respects set forth above, and set aside and cancel the Commission's Order served May 16, 1966;
2. In the alternative, remand this proceeding to the Commission for reconsideration in a manner consistent with the Court's opinion and findings; and
3. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Mark P. Schlefer

Stuart C. Law
Attorneys for Petitioners

June 28, 1966

KOMINERS & FORT
529 Tower Building
Washington, D. C. 20005

Prehearing Stipulation

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

**AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,**

v.

**FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, Respondents.**

PREHEARING STIPULATION

ISSUES PRESENTED: Counsel for all petitioners and counsel for the respondents stipulate that the issues herein are as follows:

1. Whether the Commission's determination that petitioners must include in their truck tariff a "detention rule" whereby they must "compensate the truckers for unusual truck delays caused by or under the control of the terminals" is arbitrary and capricious, and whether it exceeds and is an abuse of powers granted the Commission.
2. (a) What the Commission decided with respect to the "three-o'clock rule" contained in petitioners' Truck Tariff No. 6.
(b) Whether, assuming the order directs petitioners to modify this rule so that it will apply even where the truck driver unloads the truck "without the service of the terminal operator", it is supported by substantial evidence in the record; whether it is arbitrary and capricious; and whether it constitutes an abuse of the Commission's authority.
(c) Whether the order is arbitrary in that it undermines petitioners' appointment system for trucks.
(d) Whether the Commission's order is moot, and/or of no effect, in light of the fact that peti-

tioners have superseded the tariff which the Commission considered in its order (Truck Tariff No. 6) with Truck Tariff No. 7, which does not contain the same rule as the one in Truck Tariff No. 6.

3. Whether the Commission's order that petitioners must delete the provision in Truck Tariff No. 6 known as the "10,000-pound rule" is supported by substantial evidence in the record.
4. Whether the Commission's order prohibiting petitioners from assessing the charges set forth in petitioners' Lighterage Tariff No. 2 when lighter cargo is handled directly to or from a vessel over the side rather than to or from the pier is arbitrary and capricious and beyond the Commission's statutory power; whether it is supported by substantial evidence in the record; whether the order is further defective in that the Commission failed to find that the charges set forth in Lighterage Tariff No. 2 were unreasonable in amount for the service performed.
5. Whether the Commission's order that petitioners must establish tariff schedules and rates covering the loading and unloading of lighters to and from the pier is arbitrary and capricious and impossible to comply with, and, in addition, whether such an order is within the legal authority of the Commission.
6. Whether the Commission's determination that the petitioners must include in their lighterage tariff a provision whereby lighter companies may present all claims for lighter detention to petitioners for payment regardless of the reason for detention is contradictory with other portions of the order in that elsewhere the Commission ordered petitioners to cancel their lighterage tariff in its entirety; whether the Commission's determination is beyond its statutory power; whether it is supported by

substantial evidence in the record; and whether it is arbitrary and capricious, and constitutes an abuse of the Commission's authority.

7. Whether the Commission's order relating to the differences between the disclaimers of liability of delays in Truck Tariff No. 6 and Lighterage Tariff No. 2 is unenforceable for being vague and incomprehensible and, assuming that the order requires the detention rules in the two tariffs to be identical, whether such determination is supported by the necessary findings and substantial evidence in the record.
8. Whether, with respect to each and every issue set forth above, the Commission's order is unreasonable and unenforceable for vagueness.
9. Whether the findings and reasons upon which the Commission's order purports to be based are sufficient to support the directives therein.
10. Whether the Commission's order violated petitioners' constitutional rights including, but not necessarily limited to, their right to Due Process, or petitioners' rights under the Administrative Procedure Act, particularly § 5(c), 60 Stat. 239, 5 U.S.C. 1004(c), or both, as a result of (a) the fact that Hearing Examiner Jordan was responsible to and subject to the supervision and the direction of the Managing Director of the Commission at the time he conducted the hearings in Docket 1153, and (b) in other material respects which the present record does not on its face disclose. In this connection petitioners state that they have moved this Court for leave to adduce additional evidence relating to whether there was an improper commingling of functions and whether *ex parte* communications regarding the case were improperly made. Inasmuch as petitioners do not now know

all that such evidence may subsequently reveal, for purposes of this stipulation petitioners reserve the right to raise any issues which pertain to or affect these issues.

11. Whether the Commission's order is defective in that it orders rule making without conforming to the rule-making provisions in Section 4 of the Administrative Procedure Act. This issue is not presently framed by the petition for review; however, petitioners state that they have moved to amend their petition so as to include this issue.

BRIEFS AND DESIGNATION OF JOINT APPENDIX: The parties hereto stipulate that briefs may be filed in typewritten form, that designation of the contents of the Joint Appendix shall be made by the parties within five days after the filing of the respective briefs. The Joint Appendix shall be prepared by the petitioner and filed within two weeks after the filing of petitioners' reply brief, and when the Joint Appendix is printed, printed briefs shall be filed with the Court within ten (10) days thereafter. Nothing in this stipulation shall be construed to affect or determine apportionment of costs of said Joint Appendix.

Respectfully submitted,

Mark P. Schlefer

Stuart C. Law

Attorneys for Petitioners

Walter H. Mayo, III

Attorney for the

Federal Maritime Commission

IRWIN A. SEIBEL/WHM III

Attorney for the United States

Dated: August 3, 1966

Prehearing Order

[Filed August 11 1966]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1965

No. 20,286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Respondents.*

Before: Bazelon, Chief Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

D. L. B.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Respondents.*

Motion for Full Evidentiary Hearing; for Leave To Adduce Additional Evidence; and for an Order Directing Respondent Federal Maritime Commission To Supply Omissions from the Record.

Introduction

In a letter to counsel for petitioners dated July 29, 1966, the Secretary of the Federal Maritime Commission named the persons present at the meeting at which the Commission voted to institute the proceedings below, and also those present when the Commission considered, and voted to adopt, its final order and report under review here. A copy of this letter, and a copy of the certified copies of the minute entries of the two meetings, which accompanied the letter, are attached to this motion.

Read in conjunction with Commission Order No. 1, as amended,¹ which sets out in detail the organization of the Commission and the responsibilities of the staff, it appears almost certain that the Commission violated Section 5(c) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1004(c), as well as petitioners' rights to due process, in that persons who engaged in the performance of in-

¹ See Pike & Fischer, Shipping Regulations, Current Service, 106:101, *et seq.*

vestigatory and prosecuting functions in the same case advised the Commission in its decision.²

While the presence of prohibited persons at the Commission meeting of May 12, 1966, at which the final order was adopted, appears to be the most flagrant of such violations, such knowledge as petitioners possess indicates that it is by no means the only instance in which the Commission violated Section 5(c) and denied due process to petitioners in the course of the proceedings below. These other instances, which were called to the Commission's attention and of which the Commission was well aware, are discussed in detail below. They include illegal ex parte communications to both the Commission and the hearing examiner, and illegal control and direction of the hearing examiner by the Managing Director. Prior to receipt of the above letter, petitioners did not consider that they were in possession of sufficient evidence to warrant action on their part beyond the objections which they made.³ However, in light of the facts disclosed by Secretary Lisi's letter, that persons who were adversaries of petitioners during most of the proceedings below, and persons who helped conduct the investigation, advised the Commission as to what action it should take, it is evident that petitioners have no alternative but to ask this Court to permit them to discover, and include in the record before

² Section 5(c) provides in part: "Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer [hearing examiners] shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings."

³ As discussed more fully below, these objections were set forth, *inter alia*, in petitioners' two briefs in two subpoena enforcement actions brought by the Commission against companies who are petitioners here.

this Court, the full extent to which illegal commingling of functions, illegal ex parte communications, and illegal control of hearing examiners occurred in the administrative proceedings below.

Because of the nature of the issues involved, and because much of the evidence which would ultimately be added to the record is necessarily now unknown, petitioners base their motion on the inherent right, in cases where due process appears to have been denied by an administrative agency, to a "full evidentiary hearing." This right has often been recognized by this Court. *Amos Treat & Co., Inc. v. SEC*, 306 F.2d 260, 113 App. D.C. 100 (D.C. Cir. 1962); *Sangamon Valley Television Corp. v. U. S.*, 269 F.2d 221, 106 App. D.C. 30 (D.C. Cir. 1959); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 104 App. D.C. 226 (D.C. Cir. 1958); *WKAT, Inc. v. FCC*, 258 F.2d 418, 103 App. D.C. 324 (D.C. Cir. 1958). Additionally or alternatively, petitioners base their motion herein upon Section 7(c) of the Review Act of 1950 (the Hobbs Act), 72 Stat. 951, 5 U.S.C. § 1037, which provides for adducing additional evidence in proceedings reviewing final orders of the Commission upon a showing of materiality and reasonable grounds for failure to adduce the evidence below. Petitioners here are parties "to a proceeding to review" applying "to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence" and thus satisfy the jurisdictional requirements of Section 7(c).

For the reasons set out at the conclusion of this motion, petitioners request the Court to appoint a Special Master to conduct the evidentiary hearing sought herein. In addition, petitioners further ask the Court to issue an order pursuant to Rule 38(h) of the Rules of this Court directing the Commission to include in the certified record herein the record in each of two subpoena enforcement actions brought by the Commission in connection with the

proceedings below in the United States District Court for the District of Columbia. Some portions of these two records are included in the certified record filed by the Commission, others are not; petitioners request that the Commission be directed to include the missing portions in the certified record.

Evidence Sought

Depositions

As indicated, petitioners are necessarily without knowledge of most of the activities of the Commission's staff which took place during the course of the proceedings below, and, as a consequence, it is impossible to describe with particularity the evidence sought. However, at a minimum, it is apparent that the testimony, which may be taken by deposition, of the following persons will be necessary, limited to the issues indicated herein:

E. F. Schmeltzer, Managing Director
J. L. Pimper, General Counsel
G. O. Basham, Chief Hearing Examiner
A. L. Jordan, Hearing Examiner
Thomas Lisi, Secretary

E. S. Johnson } Employees of the Office of Foreign
W. Levenstein } Regulation of the Bureau of
Compliance

Of this group, Messrs. Pimper, Johnson, and Levenstein were at the Commission meeting of May 12, 1966, at which it adopted the final order. Johnson and Levenstein both worked in the Office of Foreign Regulation. According to Commission Order No. 1, as amended, *supra*, this office, *inter alia*:

"... reviews informal complaints and protests against the practices, methods, and operation of common carriers or conferences or against existing or proposed tariffs of such carriers or conferences and

(1) requests the Bureau of Investigation to develop additional information and data through field investigations; (2) recommends the conclusion of complaints and protests by voluntary agreement between the parties or by administrative determination that the complaint or protest fails to represent a violation of the shipping statutes or the rules, or orders of the Commission; (3) prepares recommendations, collaborating with the Office of the Hearing Counsel, for formal action and proceedings by the Commission; and/or (4) refers, as appropriate, complaints and protests to the Bureau of Investigation for action by that Bureau.”⁴

General Counsel Pimper participated personally as Acting Managing Director in the Commission's decision to launch the investigation in Docket 1153, as shown by Secretary Lisi's letter, and in this capacity had supervision over all investigatory and prosecuting functions of the staff. In addition, after he became General Counsel, members of his staff, particularly H. B. Mutter, vigorously participated in the investigation and prosecution of the case. This is clear from the pleadings filed on behalf of the Commission against petitioners by Mr. Pimper's subordinates in both subpoena enforcement actions (see below) and other matters connected with this case. Performance of investigatory or prosecuting functions by subordinates renders illegal an agency order as to which the superior—Pimper—advised. *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2d Cir. 1958) (abated for failure to substitute new postmaster on death of original defendant, 256 F.2d 681).⁵

⁴ Pike & Fischer, *Shipping Regulations, Current Service*, 106:104.

⁵ See, also, companion case, *Vibra Brush Corp. v. Schaffer*, 256 F. 2d 681 (2d Cir. 1958) (also abated); *Pinkus v. Reilly*, 157 F. Supp. 548 (D. N.J. 1957).

An even greater violation of Section 5(c)'s prohibition against commingling is presented by the case of Mr. Schmeltzer. He helped launch the investigation, as shown by Secretary Lisi's letter. He disclosed on deposition that he had personally engaged in the investigation. And as Managing Director in charge of all investigative and prosecuting activities of the staff (see Commission Order No. 1, as amended, *supra*) his subordinates advised in the Commission's decision adopting the final order. This is clearly illegal. As Judge Learned Hand stated in *Columbia Research Corp. v. Schaffer*, *supra*, at 679:

"It would be plainly contrary to the purposes of the section [§ 5(c)], if the General Counsel prepared the complaint and the Assistant Counsel made the final decision; *for the subordinate would then be passing upon the success of what his superior had undertaken.*"
(Emp. sup.)

The deposition of Mr. Lisi is required for purposes of substantiating official Commission communications, such as his letter of July 29th. In addition, his testimony is needed to help establish what transpired at the meeting and also to put on the record the official duties of the participants. The depositions of the hearing examiners are sought with respect to the receipt of improper ex parte communications and also with respect to the fact that Hearing Examiner Jordan was, at the time he conducted the hearings, improperly subject to the Managing Director's control and direction. The testimony of both examiners is needed: Examiner Jordan conducted most of the hearings; Chief Examiner Basham conducted a portion of them, and also was in charge of the Office of Hearing Examiners throughout the proceedings below. Chief Examiner Basham gave his deposition in the second subpoena enforcement proceeding in the United States District Court, discussed below. His deposition shows that there were illegal ex parte communications. There is no reason to believe

that others did not take place also, including communications to Examiner Jordan.

Restoration of Missing Portions of Record

The prior proceedings in this case include two decisions in the United States District Court for the District of Columbia—the first by Judge Wilbur K. Miller and the second by Judge Alexander Holtzoff—denying Commission motions to enforce subpoenas duces tecum against companies who are petitioners here.⁶ Petitioners seek leave of this Court to add to the record before it those portions of the record in the two enforcement proceedings which were left out of the list certified by the Commission.

These enforcement actions constitute an important part of the proceedings below. Nevertheless, the index of the record as certified by the Commission contains only selected portions of the record compiled in the two enforcement proceedings. While in general the selection appears to be highly biased in that many of petitioners' documents of record in the United States District Court have been left out, some of the exclusions appear whimsical. For example, the certified list includes petitioners' brief and exhibits in the first enforcement action, but omits petitioners' brief and exhibits filed in the second.

The omitted material includes depositions of importance to petitioners given by Timothy J. May, who at the time he testified was Managing Director of the Commission; E. F. Schmeltzer, who, as indicated above, is now Managing Director but who was then the Director of the Bureau of Domestic Regulation; Chief Hearing Examiner Gus O. Basham; and H. B. Mutter, who at the time was Acting Solicitor. These depositions contain important testimony relating to the performance of investigatory and prosecuting functions and improper ex parte communications.

⁶ FMC v. American Export Lines, Inc., et al., Misc. No. 30-65; FMC v. American Stevedores, Inc., et al., Misc. No. 16-66.

In short, the certified list is a deck of cards with the kings, aces, and other cards selected at random missing. The Commission cannot pick and choose which documents in these records please it and which do not. The Commission having chosen to include some of the documents from these judicial proceedings, petitioners are clearly entitled to an order requiring that all be included.

Additional Evidence

In addition to the above, petitioners request that any other evidence or testimony which might appear material and relevant to the issues of whether Section 5(c) was violated or due process not given also be received, *i.e.*, that there be a "full evidentiary hearing" into these questions. This is clearly appropriate in light of the evidence already at hand of violations of Section 5(c) and due process. See cases cited, *supra*, at p. 3.

Reasons for Failure to Adduce Below

With respect to the depositions of persons present at the meeting at which the Commission adopted its order, petitioners did not learn who was present until they received Secretary Lisi's letter of July 29, 1966. They could not have acted earlier.

With respect to the depositions and other material referred to which were of record in the subpoena enforcement actions in the United States District Court, but which were omitted in the certification, they obviously *were* adduced below, and were improperly left out by the Commission. As to these, petitioners are seeking relief under Rule 38(h) of the Rules of this Court, and have fully met the grounds for relief under that rule.

The testimony of the hearing examiners pertains to *ex parte* communications and improper agency control. Petitioners did not suspect the existence of the improper communications to hearing examiners until nearly a year

after the initial decision, when Chief Examiner Basham's deposition was taken in connection with the second subpoena enforcement action which, in turn, related to a relatively minor reserved issue. The issue having been previously raised in petitioners' brief in the first enforcement action that Messrs. May and Schmeltzer improperly communicated ex parte with the Commission, it was obvious that it would be a pointless waste of time to object further to other ex parte communications well known to the Commission.⁷ Nevertheless, petitioners objected in their brief in the second enforcement to the ex parte communications made to Chief Examiner Basham.

Similarly, it would have been futile to raise again the issue of improper control of hearing examiners by the Managing Director. When the Commission issued Amendment 6 to Commisison Order No. 1 on February 28, 1964 (29 F.R. 3485, March 18, 1964) subjecting Examiner Jordan to the control and direction of Managing Director T. O. May, there was widespread and immediate protest that it constituted illegal commingling of functions. Among these protests was a letter to Chairman Harlee, with a copy to T. O. May, dated March 31, 1964, a copy of which is attached, from the President of the Maritime Administrative Bar Association. Indeed, as a result of the protests, it changed the offending order (see 29 F.R. 6290, May 13, 1964), but this was not done until after the hearings herein had ended (April 9, 1964). The Commission was thus fully aware of the risks it was running and the dangers involved. It was obvious that any further gesture on petitioners' part would have been an empty formality.

⁷ In addition to the point being raised in petitioners' brief, Commission counsel Mayo appeared on behalf of Chief Examiner Basham. The Commission was thus well aware of the evidence re ex parte communications, and exhibited a total lack of concern. Similarly, in addition to the fact that petitioners strenuously argued the point on brief, Messrs. May and Schmeltzer, high officials of the Commission, were obviously well aware of the ex parte charge made with respect to them.

Relief Requested

Petitioners respectfully pray that:

1. This Court appoint a Special Master to receive the evidence referred to above, except that with respect to the records in the United States District Court for the District of Columbia, in the enforcement actions referred to above, petitioners ask that this Court issue an order under Rule 38(h) that they be added, *in toto*, to the record here. This Court has previously appointed a special master in reviewing orders of administrative agencies, *NLRB v. Arcade-Sunshine Co., Inc.*, 132 F.2d 8, 76 App. D.C. 312 (1942), as has the Court of Appeals for the Second Circuit, *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (1942).

Similarly, under the Relief Act of 1950, *supra*, while it is true that the Court has power to remand to the agency, it is also clear that this is not the only course open. To use the word "may" in Section 7(c) gives the Court a choice of methods whereby the additional evidence may be added to the record. The Court "may" remand to the agency, or may add to the record through its own master appointed for this purpose.⁸

Moreover, such a procedure would be more appropriate and expeditious under the circumstances surrounding this particular litigation. As the full record in this case will indicate, what started as an investigation of loading

⁸ The only other effect which "may" could have in the context of Section 7(c) would be to give the court discretion to refuse to grant a motion to adduce even where all jurisdictional requirements were met—e.g., even where the moving party had shown the evidence was material and that he had reasonable grounds for failing to introduce it below. This construction is clearly absurd. In connection with the relief sought herein, see *Bethlehem Shipbuilding Corp. v. NLRB*, 120 F. 2d 126, (1st Cir. 1941), where, on the Board's petition for an order to show cause why Bethlehem should not be held in contempt, the court in principle approved the concept that the court of appeals could issue subpoenas duces tecum by analogy to pretrial discovery powers granted United States district courts under the Federal Rules of Civil Procedure. See *Kamen Soap Product Company, Inc. v. U. S.*, 110 F. Supp. 430 (Ct. Cl. 1953).

practices ended as a contested case with the Commission and petitioners as adversary parties. While a master appointed by the Court would be a genuine third party, the Commission—including its hearing examiners, who are still subject to the administrative direction of the Managing Director—is in reality but one organization, and sits as prosecutor and judge. Obviously, whatever unfairness this normally generates is many times greater when the issue is whether the agency unfairly commingled functions. The very people accused of unfairness would sit in judgment on the charge that they were unfair. As this Court itself admonished in *Amos Treat, supra*, administrative hearings must be conducted “not only with every element of fairness but with the very appearance of complete fairness” (306 F.2d 260, 267). Here the “very appearance of fairness” requires a special master.

2. Pending such hearing, the filing of briefs and argument on the Petition for Review be held in abeyance.
3. The Court grant such other relief as to the Court may seem just.

Respectfully submitted,

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EXCERPTS FROM TESTIMONY AND PROCEEDINGS

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Richard J. Gage

Cross Examination

By Mr. Heckman:

Mr. Gage. * * * We asked the lightermen on several occasions to notify us of the steamship companies who did not presently pay demurrage claims that were made on the steamship companies, and have never been able to get any such list.

Q. And were the members of the conference not asked to arrange a joint meeting with the lightermen, the steamship companies, and the terminal operators, to work that out? A. I think that I—I'm not sure of that. I don't deny that. But it's very vague in my mind. I think there might have been some such talk. We had a very great many negotiating sessions, and many things were said, and I must say that I haven't thought of that for two years. But it is possible there was something of that nature.

* * * * *

Douglas Yates

Direct Examination

By Mr. Gage:

Q. Will you state your name for the record, please? A. Douglas E. Yates.

Q. What is your present occupation, Captain Yates? A. I am vice president of the International Terminal Operating Company, New York.

Q. What are your present duties, sir? A. My present duties are supervision of operations in the Port of New York for that company.

Q. Is the International Terminal Operating Company one of the large stevedores in the Port of New York?

284 A. One of the large stevedores, yes.

Q. Can you tell me approximately how many piers

are operated by International Terminal Operating? A. I will have to count them up. I should say 14 piers.

Q. Will you please explain the general experience you have in the terminal industry in the Port of New York? A. Well, I have been active in the terminal industry in stevedoring contracting in the Port of New York since 1926, ranging from assistant terminal superintendent at first and going up the line until the present time.

For the last 12 years or so, as an officer of the stevedoring company.

Q. Can you explain, Captain, just for a moment, how the term Chenango came to be used? A. Well, you have to go back many years to get the basis for this name, and in the early part of the century the labor used on the handling of lighters in the Port of New York was on a very casual basis. The men got paid cash when they worked and it attracted a casual type of labor.

The Chenango Valley of New York, upstate, is a big apple growing section of the country, and these men, after the agricultural pursuits up there were out in the winter-time and through into the spring, used to come down into

New York and they formed a good part of the labor
285 force which was used in this very casual labor em-
ployed by the lighter men on an hour-to-hour basis,
and it stems back from the origin up in that Chenango
Valley of New York.

Q. In the course of your experience, Captain Yates, have you had experience with the handling of cargo to and from lighters? A. Yes, I have.

Q. Have you had experience with servicing lighters to and from the pier as well as over the side of vessels moored to the pier? A. Yes, I have.

Q. In your opinion, what is the basic difference between operations from a cost point of view in handling cargo to
286 and from the pier on the one hand, and to and from the vessel on the other hand? A. I would like to de-
scribe the varying efficiency which in turn controls cost in this way:

When working from the pier, where after all most of our cargo is or where most of our cargo goes to, whether loading or discharging, as the case may be, we have continuity of operation.

The operation starts and is continuous because the space is available, on the one hand, where we are discharging a vessel, or the cargo is on the pier in the case of where we are loading a vessel, whereas—so we have continuity of operation, which makes for efficient handling in respect to cost. The cost is as efficient as the operation can be.

287 On the other hand, when we work over the side on lighters, we must transfer the ship's rigging to do so. We lose time. Once we start on the lighters, our limited space, our general lack of equipment over there, makes it more expensive from lighters.

So the efficiency from the dock is greater, when all the elements are taken into consideration, than the efficiency to or from lighters.

Q. Just as an historical point, Captain, has there been any change over the past 20 years in the amount of cargo which is handled over the side of vessels and lighters?

A. Yes, there has been a change. There is less cargo handled to and from lighters now than there was 15 or 20 years ago.

Q. Would you characterize this as a great decrease or lesser decrease? A. It is a great decrease. The amount of cargo handled now from lighters or even arriving at a pier, regardless of how it is handled from lighters, to or from lighters, has been dwindling ever since the end of World War II.

Q. This is true of both the servicing of lighters to and from the dock and the servicing of lighters to and 288 from the vessel? A. Exactly.

Q. In previous times, Captain, when there was a greater amount of cargo coming by lighter, was there a more continuous operation over the side when cargo was

handled over the side than is the case today? A. Well, I would like to answer that in this way: I believe that prior to the end of World War I and going back in history, I would think that we have got at least 65 or 70 percent of our freight by lighters.

Where we have a continuous flow of lighter freight to handle, there were times we could go over the side in the morning and stay over on lighters all day long.

In those days, of course, this loss of time for transferring ships' rigging from inshore to offshore, transferring our man offshore and all was much less per ton than it now is because we went over in the morning, possibly stayed over there until afternoon.

With the very little lighterage cargo we get now, we go over there and work one lighter very often. It takes us 20 minutes to get over the side, 20 minutes to rerig the ship back. We lose 40 minutes, all to handle that cargo directly from lighters.

40 minutes with a gang of men today costs something like \$80.

Q. When you testified that in the past when you
289 stayed over the side all day or most of the day,
would you have handled more than one lighter during that period? A. Yes. We handled one lighter after another.

Q. Is that common today? A. No. It hardly ever happens today.

Q. Is it usual to handle just one at a time today? A. We handle one. If we are lucky, we handle two. Never more than that, that I can recall in the last 10 years.

Q. Can you tell me, in your opinion, Captain, why it is that some cargo moves by lighter? Why generally is some cargo on lighters and other cargo on other methods of transportation? A. Well, I am not familiar with all the ramifications of why it moves one way or another, but I can see that the truckmen, for example, have been able to get into the competitive field in the lighters we are in

and they handle a great deal of cargo that used to come by lighters with a few exceptions. Metals being the main exception that I can think of at this moment.

Outside of metals, the truckmen are gradually taking over these commodities.

Q. It is the trucking industry which is— A. The trucking industry, yes.

Q. Now, Captain, will you explain what happens when a lighter is—when it is determined that cargo is coming by lighter to a pier, let us say, for export cargo,
290 who makes the determination whether this lighter is to be worked to the pier or to the vessel and why? A. The determination is made by the individual who is handling the loading of the ship. The individual who has charge of that particular operation makes the decision. He makes it on the basis of when some criteria with respect to whether the cargo is separate by ports on the lighter, whether there is only one port on the lighter, whether he has suitable stowage for the whole lighter in one compartment and so forth.

Many elements enter into this decision.

Q. If the lighter man wishes, is it in the usual practice to permit him to handle lighter cargo to the pier rather than over the side of the vessel? A. In most cases, yes. If he wishes to put it on the lighter himself, or take it off the lighter, in most cases he does so.

Q. Do you know instances where the lighter man does ask to handle the cargo himself to the pier? A. Well, I think there are probably many reasons. I think it must be remembered that lighters don't always arrive at the time when they can be loaded into the ship, and conversely, they are not always possible to get the cargo out of a ship the minute the lighter is there, and a lighter
291 man, I believe, considers the value of his equipment, the necessities of his customer or client in the same token, and he makes decisions on that basis.

But in many, many instances, they will put it to the dock themselves. Particularly, on certain commodities

such as oil in drums and so forth, it is almost invariably they want to put their own lighters to the dock.

Q. Is it common for lighter men themselves, all other factors being equal, to prefer handling cargo to the dock?

Mr. Heckman: I object to that as calling for the operation of the mind of another industry that this man admits he is not familiar with.

Examiner Jordan: Well, the other witness was asked for his opinion on many questions, and if he knows, I will let him say.

Do you know, Captain?

The Witness: Well, I can give you my best opinion based upon long experience. I would like to have the question repeated, though, if I am to answer it.

Mr. Gage: Perhaps I will rephrase the question.

Q. Based upon your experience, Captain, has it been common for lighter men to request that cargo be handled over the dock instead of over the side? A. No, not common. I would say in a majority of cases he doesn't care which way it goes.

292 Q. Are you familiar with the lighterage tariff No. 2 which is published by the New York Terminal Conference? A. Yes, in general.

Q. In your opinion, if the revenue which is derived by the terminal operators from that tariff were eliminated, would the terminal operator's decision to handle cargo over the side or over the dock vary if the revenue were eliminated? A. I feel quite sure that in most cases if there were no revenue derived from the handling of lighters over the side, we would not handle them. We would have them put it to the dock.

Q. When lighter cargo is put to the dock, how is this usually done? A. Well, the lighter man hires labor, generally nowadays, through Spencer, but he has the opportunity to hire his own labor if he wishes, and there are various means used.

A physical operation is sometimes governed by the type of barge or lighter and if the lighter has a mast and winch

and stick, an open lighter, this labor is then used in conjunction with the lighter's gear, whether sling or palletized, the cargo and hoists onto the stringpiece of the dock.

On lighters that do not have any equipment of that sort, built-in equipment such as a mast boom and winch, they hire equipment, fork lift trucks, and use fork lift trucks in various ways.

293 Q. What is meant by the term "handling cargo across the dock"? A. Well, handling cargo across the dock is where we will on occasion take that cargo directly as it reaches the stringpiece, having been put there by the lighter man, we will remove it from that point and take it directly across the dock into the vessel.

Q. This is—will you explain where the vessel is and where the lighter is in that situation? A. In that case, the vessel is on one side of a given pier and the lighter is generally across the dock from the point of the vessel where we are going to load the cargo.

Occasionally, if the berths are congested, this may happen with a lighter being behind the ship that we are going to load it into.

We would, nevertheless, receive it with our equipment in this case from the point where the lighter man lands it on the stringpiece and he has men that land it on there.

From that point, we take it directly into the vessel.

Q. So this is a simultaneous operation of unloading the lighter and loading the vessel. A. Yes.

Q. Is it very common? A. Well, less now than it
294 used to be. Of course, this again has been governed also by time elements and it generally happens towards the end of a vessel loading where time on the vessel is very important.

It doesn't happen, of course, if the lighter comes after the beginning of the operation, because really then you have your stowage commenced so you can continue in such a way.

Q. When cargo is handled across the dock in this way, who unloads the lighter? A. The lighter men.

Q. And they place the cargo on the pier? A. On the stringpiece, adjacent to the lighter, yes, sir.

Q. Now, turning to the lighters, which are worked over the side of the vessel, Captain, can you tell us what services are performed by the employees of the terminal operator on the lighter itself? A. Well, on the lighter itself the employees of the vessel break it out of its stowage in the lighter and move it to the point where the ship's gears—within the scope of the ship's fall, which in turn is governed by the placing of the boom and bring it to that point and hook it on there.

Q. Can this ship's hook reach more than one point on the deck of the lighter? A. Well, the ship's hook, 295 by gravity, reaches only one point.

However, we have some elasticity as to however we can go, depending on the commodities. In the case of certain commodities, we can pull the cargo by dragging it after he has been broken out of stowage on the lighter and slung on the lighter by these employees of ours.

Then it can, in some instances, be drawn over to this point where the fall is plumbing and at that point it is steadily taken in.

However, on machinery and dozens of commodities I can think of, you cannot drag the cargo. You must pick it up straight, in which event you put equipment on the lighter to bring it to the point where it can be lifted.

Q. On cargo you are putting aboard the lighter from a vessel, is it true, in that case— A. No. Then you must move it back from that point to where the plumb line, so to speak, arrives at and bring it back to the point of stowage and stow it on the lighter under the direction of a lighter captain, or the lighter captain or lighter runner; stow it under his direction, to his satisfaction.

Q. Do some lighters have holds, Captain? A. Yes. Most of the open lighters have holds which are covered by

hatches and at times we remove these hatches at the request of the lighter man and place some cargo below
296 the level of the deck, obviously for stability purposes, if they are taking a large load.

Q. The time taken to remove this hatch cover, during that time is the gang of stevedores on the vessel idle?

A. Well, they are idle until they open, yes. These hatches are not extremely large. They probably measure 10 by 14 but they are covered by anywhere from 8 to 10 hatch boards and a beam in the center, which is removed, wooden beam in the center.

Q. As a practical matter, Captain, could the lighter man, according to your experience, practically remove cargo from the lighter himself and place it on the deck of the vessel? A. No, he could not. First of all, the deck of the vessel is not a place where it can serve as an interchange between inland carriers and ocean carriers.

The deck of the vessel is nearly always cluttered up with the hatch covers, the beams, the pontoon hatches which belong to the vessel and that's what the deck of the vessel is used for, and when the vessel is operating in port, and furthermore, this operation of proposed operation of putting cargo on the deck of the vessel would be dangerous.

I am quite sure the U. S. Department of Labor would not allow it. There would be a danger of cargo falling off these hatch covers down the hold and furthermore
297 the space is insufficient to examine the cargo, to check it. It is completely impractical.

And added to that, I don't think one percent of the lighters in the port have the hoisting equipment to put it up there.

* * * * * * * * * * *
300 Cross Examination

By Mr. Matias:

* * * * * * * * * * *
Q. Terminal operation being one of those functions you perform like truck loading and unloading and lighter load-

ing and unloading, directly to pier, would you do that function? A. Directly to ship on the place of the lighters, but we do the truck loading, the clerking and checking, we handle delivery office, the handling of the papers, in there, and handling of lighters over the side, but we do not handle lighters to the dock or from the dock as a general rule.

In fact, hardly any instance of that occurs.

Q. You never do this. A. Hardly ever. I can't think of one at the moment where we would handle cargo from the dock to lighter or take cargo off the lighter to the dock.

Q. If you were to do that, would you do it on a contractual basis, would that be the— A. Well, we are pretty flexible in our business. We do it on a labor-supplied basis or if we were to do it, speculating now, we do it on a labor-supplied basis or contract basis, but we don't have any such contract at the time. We haven't had any as far back as I can remember.

Q. Do other terminal operators perform this function? A. Not to my knowledge, although I can't keep track of all these fellows and what they are doing.

301 Q. Now, I would like your opinion on one thing, Captain. Take export cargo, for example. When export cargo flows into the pier area and works its way into the hold of the vessel, at what point does your terminal operation cease and your stevedoring begin? A. Well, our terminal operation, in the case of export cargo, ceases and our seagoing operation begins at the point where the stevedoring gangs, the ship's gangs take it from a point of rest on the pier or a point of rest on the lighter, which may be over the side.

Q. Now, this point of rest or place of rest, would you define that for me, sir? What is it; where is it; where might we find it? A. In the case of the pier which constitutes the place that we are, I think, concerned with, is a place on the pier where it is generally on pallets, although not always so, having been placed on pallets during the course of the terminal operation, it has been brought in the course of the terminal operation down to a point of

rest somewhere on the pier, somewhere not necessarily near the vessel, but somewhere on the pier where the vessel is berthed and at that point of rest as we call it where the cargo has been resting, we have one hour or one minute or one day or more, the stevedoring operation commences there.

307 At any rate, this appears to be a double charge for one service. What is your view on that? A. My view on that is as follows: In order to work a lighter over the side we have several elements of cost which is not compensated for in the rates which we charge the steamship company which, in turn, are predicated upon a continuous movement of cargo.

We must spend our time, and therefore our money, to go over there to the lighter, which not only means bringing the men over to the lighter, which takes time, but rearranging the rigging of the vessel so that the boom is plumbing the lighter instead of over the hatch, and similarly, the boom which has been over the dock must now be placed over the hatch, and at the end of the operation this all must be reversed.

This costs anywhere—very conservatively—about 40 minutes per cycle. 40 minutes per cycle represents quite a bit of money, which is not figured in the rates which the vessel is charged for.

Secondly, the actual efficiency from a lighter varies, of course, and I will not make a categorical statement it is always worse, but it is generally slower from a lighter because of the confined space as well as these expenses which I have already mentioned which we cannot recoup in any other way.

These charges are made and hardly defray our costs to do this work, and it is the preference—I am quite sure if you bring witnesses up here, it will be the preference that lighters not be worked over the side in most cases.

310 A. Well, on the lighter, as I said before, and I will repeat it, the cargo is in bulk. It has to be broken out of its stowage on the lighter. It has been stowed on the lighter.

311 It is not on the pier where we have had a chance to receive it, examine it as to condition, as to marks. It is on the lighter in bulk and has to be handled piece by piece, brought to a point where it can be hoisted and the checker has to examine the bags, turn them over to see the marks in conjunction with a gang waiting of 22, 23, 24 men, costing anywhere from \$120 to \$130 while they are waiting to stow it, and that is one of the main reasons.

314 A. Yes. I can say this: That on many commodities it is well known to us, and I would testify, and I am under oath, that we will do as much as 20 percent more from the dock than we will from lighters on many commodities.

To every statement there is always exceptions, and the exception—the only one I can think of is possibly on slab copper, where it has to be stowed on the lighter and barring bad weather we might do equally well. We might do

316 Why are these costs not recouped in your stevedoring charge to the vessel? Isn't this proper place to do it? A. No. I say again that the ocean carrier is entitled by custom, if not by the terms of the bill of lading,

ing, to have this cargo either at his tackle or at a
317 point of rest adjacent to his tackle. He is not—
the ocean carrier does not intend to pay, as far as
I have ever been able to discover, for breaking out of the
stowage on the lighter which has been stowed by the
shipper and breaking it out of stow is not part of the steam-
ship company's or the ocean carrier's expense.

We have never been able to incorporate in a contract

with a steamship company the cost for that because he considers that is not part of the ocean movement.

Q. But it is part of the stevedoring movement, is it not? And he pays for the stevedoring. A. Not the breaking out of stow. Then we might as well take it out of the trucks when they are in stow in trucks, which we don't do.

The only time we will take anything directly from a truck into a vessel is if it is one piece, a heavy lift mainly where there's one piece, cannot be said to be in stow in that truck or in bulk in that truck. It is one piece. We do not take trucks of bags, for example, which are stowed in the truck and take that directly to the shipper. It has never happened in my knowledge.

* * * * * * * * *
451 If the pier is empty and a hundred trucks come in the morning at 8 o'clock, we obviously don't have a hundred checkers for a hundred trucks, and then at 9 o'clock the checkers are idle until possibly 9 o'clock when maybe fifty or sixty more come.

We have as many checkers and as many teams of truck loaders as we expect to be able to carry the work and finish the day's work promptly and by 5 o'clock. But we cannot tell when these trucks are going to arrive at what hour of the day. We have no indication to us.

The permit does not tell us what time they will arrive. And the cargo which comes without being permitted the small general cargo, comes whenever they feel like sending it during the course of the time the vessel is loading. So we have a condition which no one can control, not even the truckmen, because there are many of them. We deal with it as best we can.

* * * * *

576

Richard J. Gage

Cross Examination

By Mr. Knebel

Q. Well, do I understand from the first numbered sentence in the first full paragraph of Page 13 that you have never attempted—by "you," I mean the New York Terminal Conference and/or any or all of its members—have 577 never attempted to reduce loading and unloading operations to a—let me rephrase that.

Do I understand that you have never made studies as to the cost in performing loading and unloading operations, both from lighters and from trucks? A. Oh, no. We've made a great many truck studies, Mr. Knebel. With regards to lighterage, though, prior to the study which we made and which became Exhibit 21, we did not make—the conference did not make any cost studies. The individual members may have made cost studies. I don't know.

693 Q. What is the purpose of Item 10, Mr. Gage?

A. The purpose of it is to guarantee to the truck-man that his truck will be serviced if he arrives by a certain time, and to point out to him that if he arrives after this time, that he is not entitled to service.

Q. But with respect to trucks arriving within the time limitation, you only commit yourselves to service those for which you will perform a loading service and collect a loading and unloading charge? A. Yes.

694 The reason we do not have the rule applied to vehicles unloaded without our services is that we have no control over the speed of the driver. And many times, the motor carriers send trucks to the piers which cannot be unloaded in two hours by the best driver in the world. And we're not going to keep our pier open under

those circumstances at prohibitive overtime rates while some truck driver unloads a 40-foot trailer full of cartons of cigarettes.

Q. Now, where the terminal operator unloads, what equipment and what personnel are furnished to perform the operation? A. This depends, of course, entirely on the type of truck and the cargo which is being unloaded.

Do you want me to explain some of the various possibilities?

Q. Yes. Give a couple of examples. A. And your question refers to unloading, not to loading trucks, is that right?

Q. That's right. A. Generally we are asked to 695 unload only cargo which a truck driver can not unload himself. This is not always true. Sometimes the trucking companies ask us for our service regardless of the fact that their driver might be able to do it.

In such instance, for example, bagged goods, which normally could be unloaded by a truck driver—we are occasionally called upon to do it. We would then put two of our men in the truck along with the driver, and they would carry the bags to the pallets at the rear of the truck and—

Mr. Schlefer: Keep your voice up.

The Witness: Two of our men plus the truck driver would carry the bags to pallets at the rear of the truck.

In that instance, the pallets might be on the trucks since we are doing the operation, and our hilos would take it away.

That happens, and it happens a great many times because we handle 6,000 trucks a day, and most of these things happen many times, but on the percentage of our total operation it's very small.

More common in unloading is the package that weighs above 200 pounds, let's say, where it's too much to ask a truck driver to do it. This might be barreled goods. Take barreled goods, for example, or baled goods. The operation is similar. Even possibly some heavy bagged goods.

There, the unloading operation is basically the
696 same. Two of our men plus the driver get into the truck, bring the cargo from the truck back to the tailgate of the truck. It's usually put on a pallet there, or it may be put on a stack of pallets just off the tailgate of the truck.

By: Mr. Knebel:

Q. Excuse me, Mr. Gage. Are you speaking now of instances where the truck driver unloads? A. No. I'm speaking of instances where we do the unloading and make the charge. I understand that's what you are asking me.

Q. Yes. A. In all instances, though, the truck driver assists.

In some instances the cargo is quite heavy, and it's on these big closed trucks, so we can't get around to the side with our hilos. We might use rollers under the cargo and our men plus the truck driver will have to pull the rollers out and roll that cargo forward.

We might take a chain or a rope from our hilo and attach this to the cargo and drag it out if the cargo is such that this won't damage it.

There are various methods we can use to get the cargo out. Now, these are the big closed trucks.

Primarily the Interstate Trucking Association, such as Mr. Knebel represents, use big closed truck trailers. I suppose they have some open flatbeds which bring cargo 697 to the piers. But primarily they use the big trailers, and these are the most difficult to unload.

The local trucking concerns use the open flatbed truck to a much greater extent. And normally our operation is much simpler with an open flatbed truck because we can get our hilo around to three sides of the truck, and this great dragging operation or rolling operation is not required.

In some instances there we don't even put our men on the truck. It's possible for a hilo to drive up to the side

of the truck and get the cargo and take it off the truck. We have quite low tariff rates for this service and we encourage—we like this service because we would rather have our hilos do the work than have our men go in the truck. But we have the service for the big trailers as well.

A great amount of the equipment we unload is heavy equipment, 2,000 pounds, equipment definitely over two, three, four, five hundred pounds, equipment which can not be picked up by one man or even usually by two or three men. It's equipment which must be handled by machinery or by some kind of a contrivance such as a roller.

Q. Would you say, Mr. Gage, that in instances where the pier operator unloads, it is the normal situation for the pier operator to furnish two men on the truck? A.

Where the cargo is of a nature where it is not handled by the hilo off an open flatbed, that is usual, 698 yes, two men on the truck plus the hilo driver and the hilo.

Q. Now, the charge you assess for this service includes what? A. The charge is just the charge which is stated in the tariff.

Q. Let me rephrase it. Does the charge that you assess for this unloading service cover the cost or purport to cover the cost of the men the pier operator puts on the truck? A. Yes.

Q. Does it purport to cover the cost of the hilo equipment and the operator of the equipment? A. Yes.

Q. That would be so even though the hilo picked the cargo directly from the bed of the trailer or whether it took it from a pallet at the tailgate of the trailer? A. Yes. Where it takes it from the bed of the trailer, we normally have quite low rates.

Q. What does the hilo do with the cargo after it picks it up? A. Well, of course, this depends again on where the truck is and where the place of rest on the pier is going to be.

In many instances the truck is spotted at some 699 place quite near to the place of rest on the pier.

And when I use this term, "place of rest," now, I'm speaking of it in the way that Mr. Matias and I were speaking of it in the first day of this hearing. A place of rest is the spot where the cargo is intended to stay during its tenure on the pier and from which it will be picked up when the stevedoring gang is going to load it on a ship.

Now, in many instances the trucks go down the pier and the cargo is taken from the truck directly to this place of rest, which may be right next to the truck. It may be a short distance away.

Where the trucks unload at the front of the pier and are therefore very probably some distance from this place of rest, I understand it is usual for the pier operator to have an intermediate point fairly near the truck unloading depot at which they deposit cargo, and then other hilos pick the cargo up from this point and take it to the place of rest.

James Raymond Ennis

Direct Examination

761 By Mr. Zinder

A. Few, very few trucks arrive at the pier at 8 o'clock in the morning for one reason. We start our men at 6 o'clock. Regular shape is at 7. When we start at 6, they have already received one hour at time-and-a-half. So that your regular overtime starts at 4 o'clock in the afternoon, so they have an hour, all pier men. And I don't say most, but all pier men start at 6 o'clock in the morning, so that they will get to the pier by 7 or 7:15 to more or less assure that they get a low number pass at the pier to facilitate us getting in and out.

896

Joseph Cicala

Direct Examination

By Mr. Zinder

Q. Now, if you desire to get pass No. 1 at any given pier, an average pier on an average day, how early in the morning does your truck have to arrive at the piers? A.
Depending on the location, he would have to leave
897 my barn approximately 5:30 or 6 o'clock in the
morning, to be probably No. 5 or 6.

904 Now, would they also supply you with a checker?
A. Yes, sir.

Q. Now, with regard to unloading of vehicles, what has been your experience with regard to the number of hilo operators which are assigned to your vehicles to unload it?
A. One is all we've ever seen.

Q. Now, this one hilo operator—when he is unloading your vehicle, is he also unloading other vehicles? A. Yes, sir.

Q. Now, generally how many vehicles at one given time does a hilo operator unload? One, two, three? What is your answer? A. My experience has been that he services approximately four, three or four.

Martin H. Michael

Direct Examination

967 By Mr. Zinder

A. We usually load our trucks the night before for the Grace Line and we dispatch them anywhere from 6:30 to 7 o'clock. At 9:30 we get a call from the driver
968 that he is up around 23rd Street and that he is in line to get into the gate. You see, you can't get a

pass if you get into the gate. Sometime around 10:30, he will call that he got into the gate and he is going to get papers routed and he will start working sometime that afternoon.

1046

Vincent J. Campion

Cross Examination

By Mr. Matias

A. Our objection was that the charge, first of all, should not have been levied against us at all. We have always felt that there was a definite advantage to a steamship company or a stevedore in loading our particular commodity. Let me stay with the commodity I am most familiar with. It has always been to their advantage to load it offshore over to the pier, and yet this charge was assessed.

When we tried to get relief from this, we had the constant threat that all of our cargoes would be put to the pier if we did not consent to these rates.

I don't know how they began, but we have never had a session with the terminal operators that I haven't heard at least one or two of the lighterage companies get up and make a strong protest against the issuance of the charge at all.

1051 Q. I think the terminal operators would state—I
hope I am stating it correctly—they are providing
the lightermen a service, from what Captain Yates and
from what Mr. Gage said in their testimony—so why
1052 should you not, the lightermen, pay for the services
which are provided you.

How do the lightermen respond to this assertion, Mr. Campion? A. Well, I think it goes back to the statement I may some time back with regard to the objections we had to the green sheets.

We have always felt that the stevedore had a function to perform to service his ship. This was to discharge or load the ship. The fact that he loaded on our lighter offshore as against loading inshore to the deck—and I still maintain that it can be done more efficiently, if not more so, offshore—that this should not preclude the charge to us for this service, if you want to call it a service.

I say he is performing something but it is for the vessel's convenience.

Q. You mean it should not include, if I understood your testimony? A. It should not include a charge.

Q. I think I can help things out with this question: Is it your testimony that the direct loading is a stevedoring function for which the terminal is being compensated by the steamship company? A. Yes.

Q. And, therefore, the charge to you should not be
1053 assessed? A. Yes.

Q. Is that your basic position? A. Yes.

Q. Do the stevedores provide any service on the decks of your lighters that you would not consider to be stevedoring? A. That I would not consider to be stevedoring?

Q. Yes. A. No. Everything they do is stevedoring, I think.

* * * * *

1059 I believe that in some cases the steamship companies pay the demurrage, do they not? A. They do.

Q. And in other cases they do not? A. In other cases, they do not. The general arrangement with the steamship companies today is 48-hour freetime for the first 200 tons, and then 24 hours for each additional hundred tons.

If we had 560 tons of copper on a scow, the stevedore can take from Monday through Friday, Saturday and Sunday of free days, and he can handle it, to unload before he pays our demurrage. The scow is then there a total of eight days before we collect any demurrage and that's the basic arrangement that we operate under today.

Q. How many of the steamship companies do pay
1060 you demurrage? A. I would say a good portion of them.

Q. Do you know why it is not done in the cases where it is not? A. You run into various objections. I have had one steamship manager tell us that he wasn't going to pay any demurrage charge and if I persisted in trying to collect it, he would take his business away from us that we are doing.

It is an arbitrary rule and, as I said before, there is no place that you can point to where there is a set of rules than anyone has to live up to.

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Daniel F. Hession

1138 Direct Examination

By Mr. Heckman

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Q. What has been your observation with respect to the time and work spent by a stevedore in handling cargo over-the-side compared with to the dock? A. I would say the operation over-the-side would be a more efficient operation in that the area where the men are going to work is prepared for them. There is no congestion, obstruction. They work under ideal conditions.

Working inshore through the piers there are a number of operations going on simultaneously and they con-
1139 tend with pier congestion, while they are unloading a ship.

Perhaps they have to ride the cargo maybe 400 or 500 feet out to the apron of the pier; maybe into an adjacent pier.

Q. What do you mean by the "apron of the pier"? A. That is the part in front of the area which is on the street; in front of the pier. That is the apron of the pier.

Q. What would be the result if the cargoes over-the-side were placed on the pier along with rest of the cargo from

the ship? A. Under the circumstances, it might be physically impossible. If we have, say, 2000 tons of copper in the ship and they try to put that on the pier along with whatever they have already on the pier, outbound cargoes which are assembled on the pier, plus the inbound cargo coming off the shore, they might have to ride the cargo right out onto the apron.

Q. Are we to gather that there are numerous occasions when an inbound ship is being discharged and during the same time there is already on the pier cargo delivered for some other vessel that is later scheduled to come in? A. In some other vessel that is later to come in or for the very same vessel that we are discharging.

Q. How long is it since you have seen cargo stowed below deck on any kind of lighter operated by lightermen 1140 in the port? A. Actually, I am on the New York piers 21 years and I have never seen cargo stowed below the deck.

Q. In the old days, did you hear of lighters which had been built to take some cargo below deck? A. Yes. I have actually seen lighters that did have a small cargo hatch below deck, but I know in the instance of our own fleet back as far as the time I have been there—15 years, 18 years—we have actually had these hatches closed up and the deck built over the hatchway to increase the volume of the deck's space for deck cargo.

Q. On your lighters and your scows, is the cargo carried on an open deck that has no obstruction so far as the cargo space is concerned. A. Yes, that is correct.

* * * * *
Cross Examination

1214 By Mr. Schlefer
* * * * *

Q. Do you know of any prejudice or discrimination or disadvantage against your company with respect to the rates applied by the New York Terminal Conference? A. Against my company in particular?

Q. Against your company in particular or against the lightermen in general. A. As far as I can recall in my 18 years in the business with Gillen, I continue that we have always felt that the stevedoring charges that were assessed to us were unfair and we always paid them under protest; always under a threat that if we didn't pay them the material would go on the dock.

That was the only reason why we paid them: in the interest of our customers to get dispatched at the piers.

Q. In other words, is it your feeling that any charge
for the loading of cargo directly from the lighter to
1215 the vessel or from the vessel to the lighter was un-
fair? A. Yes; that's always been.

Q. Why do you pay the charges? A. Purely because there was always a threat that if we didn't pay them, the material would not be accepted alongside the steamship or we would not get our boat loaded alongside the steamship. There was always the threat that "if you don't do that, your material will go on the dock."

Joseph M. Adelizzi

1574 Cross Examination

By Mr. Schlefer

Now—and this, I don't mean to argue the point, but I make this observation: As far as we are concerned at 1575 export where we unload our own truck, the terminal operators have no interest to us. We have no relationship with them at all, except as they interpose themselves between us and the water carrier.

Now if the terminal operator—if we are not using his services, then he is not interested in the operation. Then it becomes the responsibility of the steamship, the water carrier, and we say to the water carrier, "When we make available to you—" or "When we offer to tender to you

export cargo at 3:00 o'clock in the afternoon, we expect you, under the law, to receive it." See?

Now irrespective of what the interpretation may be, our position is that we are entitled to service from either the water carrier or his agents, and any determination or any ruling or any condition that if we are not there by 3:00 o'clock, they can elect to service us or not, we think is arbitrary and should be found illegal.

Q. Let me see if I can clarify this for you a little bit: You think that the 3:00 o'clock rule ought to apply where the truck unloads its own cargo? A. Of course we do. We think if—

* * * * * * * * * * * *
1579 A. And I finish by noon. At 1:00 o'clock I present myself at a pier to make the delivery. Now for reasons beyond my control, I can't get service and there is no service—

Q. What service do you need at this point? A. I need a checker. I need a place to put the freight. Both of which, I have no control over. I have no control over checkers. The terminal operator assigns me a checker and he assigns me a place to put the cargo, and in my case he has got to assign me a hilo operator because much of this freight is interchanged at the head of the pier with what we call the farm, so that I wait there. I hang around there and comes 5:00 o'clock—or let me give you a more frequent experience—comes 4:00 o'clock they start to service me, and they take off a third of the load, and comes 5:00 o'clock and they say, "Well, Johnny, come back tomorrow." What is this?

Q. Do they actually shut you down at 5:00 o'clock? A. Yes, absolutely. And we've got some letters right to that effect.

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Martin H. Michael

2024 Direct Examination

By Mr. Zinder:

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When you are working for steamship companies with the type of facility that you have in Pier 1, it's a wonderful facility, but you can't overtax it. You can't overtax any facility. This facility is completely overtaxed. You can't get appointments at Pier 1. It's almost impossible to get appointments there.

We called up for an appointment yesterday for today. We got an appointment for Thursday. That's 3 days later. This is at Pier 1. We couldn't even get an appointment for the next day or the day after that. It was three days later.

You can't checkers because they shift their checkers around.

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2050 Cross Examination

By Mr. Matias:

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A. Pier 6 Bush—making an appointment only gives you the right to appear to get a pass. So that is a miserable operation at Pier 6 Bush.

94 North River—when they did have an appointment system—at that time it wasn't 94; it was 92—if we got a truck there before 8 o'clock, he was normally serviced by 1 o'clock in the afternoon, so that didn't work out too well. Breakwater—they have a very efficient appointment system. It's a good appointment system.

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2108 Examiner Jordan:

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Based on the record as developed, I find and conclude that the subpoena under consideration has not been complied with.

Mr. Schlefer: We except to your ruling respectfully, for the reasons heretofore stated.

2109 Examiner Jordan: All right. Of course, this part is on the open record.

Mr. Schlefer: Yes.

Examiner Jordan: Do you want to go on the confidential record now and have these last contracts marked for identification? Or what procedure do you prefer?

Mr. Matias. Should we not first establish what we are going to do in light of your ruling of this morning, Mr. Examiner? Do you plan to take this up with the Commission or will the respondents again reconsider the situation? Just how do we stand?

Examiner Jordan: Well, under the rules as I understand them, all I have to do is report to the Commission that the subpoena was not complied with, and what the procedure would be from there out I don't know. The interveners sought and obtained the subpoena. They may have their own ideas with respect to the enforcing of the subpoena. I don't know about that.

Mr. Zinder: Could we go off the record for a minute?

Examiner Jordan: Well, should we go off the record? If we are going to discuss this point, should we not stay on the record unless all parties agree?

Mr. Zinder: I was just wondering. I discussed with Mr. Gage on the subpoena—I did on the record in fact. I was wondering if you desire if I repeat the affidavit of service in regard to that or is it not necessary in
2110asmuch as I did serve it and he did admit receiving it on the record.

Examiner Jordan: If Mr. Gage accepts service on the subpoena itself, that would be adequate. But in the ab-

sence of that, the return should be made on the subpoena as required by our rules.

Mr. Zinder: With regard to the enforcement of your decision, Mr. Examiner, I myself am checking this out. I have not yet reached any absolute conclusion with regard to it.

It is my general understanding that the enforcement proceedings of this nature are either generally brought by the general counsel of the agency or by the Department of Justice together with the United States Attorney. However, I will check this out further.

Mr. Matias: I would guess, Mr. Examiner, on that point—I have not looked at our rules—I don't know that it is in our rules—it may very well be—that in this situation you would report to the Commission, and the Commission would then report to the General Counsel who would themselves either seek a general injunction or report the matter to the Justice Department.

Examiner Jordan: What happened with respect to the service? Did you get any agreement as to that?

Mr. Zinder: Mr. Gage, do you acknowledge once again on the record?

Examiner Jordan: It is not that, Mr. Zinder. It
2111 is a question of accepting service on the subpoena itself. If he wants to say service accepted and sign it, that is adequate.

Mr. Gage: We will sign it.

Mr. Zinder: Mr. Gage has indicated he will sign it.

Examiner Jordan: Then that is all right.

Mr. Zinder: I just call your attention at this time, Mr. Examiner, to Section 29 of the Shipping Act which says, "That in case of violation of any order of the Board, other than an order for the payment of money, the Board or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties—"

Mr. Matias: We are not dealing with an order of the Board, or in this case, the Commission.

Mr. Zinder: The Commission—"and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by an injunction or other proper process, mandatory or otherwise."

Mr. Matias: My understanding is, there would have to be an intermediate step. The Examiner would have to refer to the Commission who would have to issue an order.

Mr. Heckman: Is the record clear that the respondents refuse further compliance with the subpoena other than what they have produced to date?

Mr. Schlefer: Our position is that Mr. Gage has complied with the subpoena.

2112 Mr. Heckman: That is not quite what I asked. I asked whether the record is clear that the respondents refuse to produce other documents called for by the subpoena.

Mr. Schlefer: I say, Mr. Examiner, there are no other documents called for by the subpoena.

Mr. Heckman: Well, I still think that if this matter went before the courts, there would be a gap in the record as to whether or not the respondents refused to produce other documents. I don't think there is a specific refusal on the record.

Examiner Jordan: I think that would sort of close the situation and complete the record, if you did answer that question.

Mr. Schlefer: Well, Mr. Examiner, I say on the record that it is our view that we have produced everything that was ordered to be produced pursuant to the subpoena. And since we have produced all those documents, why, we refuse to produce any more.

Mr. Matias: Well, Mr. Examiner, I believe Mr. Gage stated yesterday there were other contracts outstanding, contracts that he knows to exist but was not seen. Maybe we can simplify the proceeding by approaching it from that view. These other contracts admitted to exist, will they or will they not be later brought in?

2113 Mr. Schlefer: I have said all I intend to say.
Examiner Jordan: I think that is sufficient.
Let's go off the record for a second.

(Discussion off the record.)

Whereupon,

Richard J. Gage

was called as a witness and, having been previously sworn,
was examined and testified further as follows:

Recross Examination

By Mr. Zinder:

Q. Do you recall your statement previously on record
that you would accept service of the subpoena in lieu of
service thereof being made on each individual member?
A. Yes.

Q. And do you so state; is that correct? A. Yes.

Q. Were you authorized to so accept service?

Mr. Schlefer: I think that is a question of law. Ask him
for the facts.

Mr. Zinder: How to answer on this question, your
Honor—The witness indicated at that time that he was
going to accept service.

Mr. Schlefer: Ask him for the facts. That will satisfy
yourself as to what happened. I don't think you should
ask the witness—

Q. Mr. Witness, did you advise the conference
2114 members that you had accepted service on their
behalf? A. That I had accepted service?

Q. Yes. A. Yes.

Q. And did they at any time object to you? A. No.

Q. Are we, therefore, correct in assuming that they had
knowledge that you had accepted service on their behalf?
A. Yes.

Q. At any time did any of the respondents direct you not
to accept service on their behalf? A. No.

Q. And was it with the understanding that you had accepted service on their behalf that they replied to your inquiries?

The Witness: Read the question again.

(Pending question was read by the Reporter.)

A. Oh, yes.

Mr. Zinder: No further questions. Oh, just a moment,
Mr. Examiner.

Q. Mr. Gage, at the time of the commencement of the hearing, the Examiner asked "Who appears for the respondents?" And you answered "Robert J. Nolan and Richard J. Gage, 80 Broad Street, New York 4, New York."

Do you recall that? A. Yes.

2115 Q. On the basis of this, are we correct in assuming that you appeared in this proceeding on behalf of the conference and on behalf of each of the individual respondents as attorney? A. I would say just on behalf of each individual respondent. The conference is not a party.

Mr. Zinder: All right. Thank you.

Mr. Schlefer: Off the record.

(Discussion off the record.)

Examiner Jordan: What is the next order?

Mr. Knebel, are you ready?

Mr. Knebel: Yes.

Mr. Zinder: This is on confidential record, I believe.

Mr. Matias: Off the record.

(Discussion off the record.)

(Whereupon, the proceedings were continued on the confidential record; following which the proceedings continued as shown on the following page.)

2116 Recross Examination (resumed)

By Mr. Zinder:

Q. Mr. Gage, there was marked yesterday for identification a series of letters—

Mr. Zinder: Strike that. No, continue it.

Q. A series of letters regarding correspondence with Henry Pape Inc. One of the letters, letter dated August 25, 1959, from Richard J. Gage to Sol Yudenfreund—do you recall sending that letter to Mr. Yudenfreund? A. Yes.

Q. Am I correct that this letter states generally the height to which freight is to be loaded into trucks?

Mr. Schlefer: The letter states what it states.

Mr. Zinder: Strike the question.

Q. Mr. Gage, would you have any objection to the insertion within your tariff of the provisions of that letter?

A. Yes.

Q. Would you state the reason why? A. This letter was written very shortly after I came to the conference, and I didn't understand when this issue came up just what was involved. The matter was not considered with any reasonable deliberation. It is not a reasonable requirement at all in my opinion.

Q. What is not a reasonable requirement? A. The requirement stated in this letter. And it has never 2117 been, in my opinion, a responsibility upon us to do as this letter states.

Q. Since that letter was sent, has the tariff committee of your conference issued any determination with regard to loading which is dissimilar to that determination? A. I don't know if this can be called a determination. The tariff committee has not formally done anything about this matter.

Q. Since that date? A. Since that time.

Q. Mr. Gage, among these exhibits is a letter dated June 25, 1963 from A. Wypler to Robert St. John, Federal

Maritime Commission. Did you ever see a copy of that letter? A. I don't recall seeing it, no.

Q. Did you ever discuss the matter set forth in that letter with Mr. Wypler of ITO? A. I don't recall anything about this letter, either discussing it or seeing it.

Mr. Zinder: I have no further questions.

Examiner Jordan: What time do you want to come back?

Mr. Gage, you won't be there.

Do you have a witness for 2:00 o'clock? Do you want to recess now until 2:00 o'clock?

Mr. Schlefer: 2:00 o'clock.

Mr. Zinder: I want to be excused for the balance 2118 of today and all of tomorrow. I will be here Friday with two witnesses.

Examiner Jordan: We will recess until 2:00 o'clock.

(Whereupon, at 12:40 o'clock p. m., the proceedings were recessed for luncheon.)

2119 AFTERNOON SESSION

(2:10 p. m.)

Examiner Jordan: All right.

Whereupon,

Douglas W. Binns

was called as a witness and, having been first duly sworn by Examiner Jordan, was examined and testified as follows:

Direct Examination

By Mr. Henderson:

Q. Please state your name for the record. A. Douglas W. Binns.

Q. What is your position? A. Traffic Manager, Port of New York Authority.

Q. What is the address? A. 111 Eighth Avenue, New York 11, New York.

* * * * *

Walter J. Byrne

2499 Direct Examination

By Mr. Schlefer:

* * * * *

Q. Mr. Byrne, would you kindly state your name, please?

A. Walter J. Byrne.

Q. What is your present business occupation, sir? A. I am a partner in the firm of Byrne, Wheeler & Company, management consultants of New York City.

Q. What kind of work does your company do? A. I would term in general management consultation; primarily most of our business is in the Maritime field.

2500 Q. And how much experience have you personally had in the field of marine terminal operation? A. I started in 1946. And the firm has been continuous since that time. In 1960 I took a leave of absence and became Executive Vice President of the John W. McGrath Corporation of New York City. And I left and returned back in my own business in 1963, January.

Q. Is the John W. McGrath Company a large terminal operator and stevedore? A. Yes. That's right.

Q. Is it one of the larger companies in the port? A. I would say yes.

Q. What was your education, sir? A. MIT.

Q. Are you familiar with the handling of lighters and cargo to and from lighters? A. Yes.

Q. Would you direct your attention, Mr. Byrne, to Exhibit 87 for Identification, and could you tell me generally what that exhibit purports to show? A. There is an endeavor here to record the areas wherein additional costs are attributable to direct transfer to and from lighters in and out of vessels.

Q. Can you discuss with us and amplify the first 2501 item on Exhibit 87 for Identification? A. In order to work offshore, whereas you are normally working inshore with the Burton rigging, one boom over the hatch

and the other boom over the side inshore, you have to shift your gear, put one boom over the side and the other boom over the hatch. And when you are finished with that operation, you have to transfer back. And that takes usually 20 to 25 minutes each way. We are talking about 40 or 50 minutes. And we are involving, say 23 men, the time of 23 men.

Q. And that is, I take it, a cost which would not be incurred by the stevedore or the terminal operator if the cargo were loaded to place of rest on the pier? A. If the operation entailed just the one rigging of the vessel, this would not occur, this extra rigging for the offshore for a period of time and back inshore; you wouldn't have that extra rigging which is involved here.

Q. What is meant on Exhibit 87 by breakout and transfer under hook-loading? A. In loading a vessel—

Q. When you are talking about loading, you are talking about loading the vessel and discharging the lighter? A. That's right. Discharging the lighter or loading the vessel.

You rig your offshore boom into a position and that becomes a fixed position as respects the vessel. Of course,

your cargo on the lighter is spread over the lighter.
2502 And by means of breaking out the cargo you have to move it under the hook.

There is a little leeway as far as some swing. But from a standpoint of damage to the lighter, damage to the cargo and injury to individuals, you have to minimize much of the swing which you are allowed to use.

Therefore, there is a transfer movement in most instances in which you have to get under the hook and get a straight lift of the draft in order to transfer it into the ship. And many times the breakout is complicated, in which, say, you might have a lighter full of drums and they would be permitted and you would have to be very slow in starting and getting the initial, say 25 percent of the drums out of the way before you could then start moving them, rolling them into the area where you hook them up and hoist them aboard.

Q. Is there any equipment transferred to the lighter for this purpose? A. Yes. In many instances where the lighter will take it, the lighter deck will take it, you can bring a hi-lo over. And that is another particular problem. In that instance there, a hi-lo which would weigh seven or eight thousand pounds, you have to take that—do it properly in pretty much two steps, if you are using ship's gear. You have to swing the hi-lo on deck and then swing it over onto the lighter. And there again, it creates problems because of the rigging question and the capacity of the ship's gear. And under a married rig where you normally could handle three tons, it is a specialized operation, and it does take time. Vice versa, in removing the equipment off the lighter back onto the ship and back onto the dock.

Q. Your third item on Exhibit 87 is transfer from hook to stow-discharging. Does that refer to discharging the vessel and loading the lighter? A. Yes, this would be in reverse of the loading vessel operation, in which again with the fixed boom over the lighter you land the draft under the head of the boom and then it has to be transferred into the position of stow and the stowage has to be proper and agreeable to the lighter captain. So that takes some care.

Q. Is there a time and expense factor in that it would not be incurred on the discharging the vessel to the pier?

A. Well, in both 2 and 3 which would involve—

Q. When you say "2 and 3" you refer—A. Items 2 and 3.

Q. On Exhibit 87. A. There is a transfer operation, breaking out and moving to the hook on a loading vessel operation and vice versa, a transfer from under the hook into the position of stow. And those operations take time.

Now, when we work from the dock, either from the dock or onto the dock, it is a continuous flow operation; 2504 we come out with the slings or with pallets and we have equipment to take it away from the stringpiece, and there is no interruption, whereas there is interruption

here because we have to make these moves after we either land the draft or make the move in order to pick up the draft.

* * * * *

2508 Q. Finally, you have an item on Exhibit 87 designated lower production in tons per hour. Can you explain that, sir? A. In most cases—and I personally have run tests, sampling tests on handling cargo direct to and from lighters as against what it would be in working from the pier stringpiece—and mainly because of items 2 and 3 which refer to the breakout and transfer under the hook and vice versa from under the hook to stow, that significant differentials up as high as 20 per cent I have personally recorded as far as the production to the dock or from the dock being higher than to and from the lighter direct.

Q. Is this in addition to the time taken with respect to rigging and rerigging the boom? A. This would also include the extra time involved in rigging and rerigging.

Q. So you would say there is some overlap between 1 and 7 but it is not total overlap? A. That's right. When we determine our production, we have to take into account such items as rigging and have to assign that time into our hours in order to determine tons per hour which is the production.

Q. But even if you excluded the time for rigging and rerigging noted in item 1 on Exhibit 87, there would still be some lower production in tons per hour due to the
2509 lack of continuous movement? A. Yes.

* * * * *

2512 Q. Mr. Byrne, I am asking you to assume the validity and truth of the figures stated on Exhibit 88. And on that assumption would the 2.52—approximately 2.5 per cent of the total cargo which might be transferred via the dock instead of on direct transfer between lighter and ship—would that have any appreciable effect on cargo congestion on the pier? A. I would say it wouldn't

have an appreciable effect, in most instances. A particular instance of a bad day, crowded conditions. But as a general rule, no.

Cross Examination

2515 By Mr. Matias:

A. You mentioned rigging. In making up a stevedore rate, it is assumed that you would rig in the morning and, say, unrig at night. If in the interim we have to re-rig offshore and back again, that type of expense is not normally included in our cost. And most terminal operators are not that fine—I don't know of any that would be so fine and call out and constantly add on the cost when they have lighter freight.

So it rarely enters into any computation of the rate. So that I would say the re-rigging and rigging offshore is not fully compensated for in any stevedoring rate.

Redirect Examination

2552 By Mr. Schlefer:

Q. On direct loading or discharging over the side, directly to lighter, does the stevedore understand that he will earn revenue from the lighterage tariff? A. Yes.

Q. Is the same thing true in constructing the stevedore rate to the steamship line? A. I would have to say there that it is generally taken into account but I don't know whether the stevedore's records are that good to get into those elements, but he does know he will get some relief to take care of his other costs. So it is sort of a wash. I think he would consider it sort of a wash of added expenses and some revenue to counteract.

Exhibit 1. Statement of Richard J. Gage

If the lighter is worked to or from the pier, the lighter operator has the responsibility of moving the cargo between the lighter and a place of rest on the pier. Usually a heavy metal plate is placed so that one end of it is on the pier and the other end is on the lighter. The cargo is generally moved by hilo across this metal plate, in either direction. If the tide is such that the lighter is too low to permit use of such a metal plate, then a hilo on the lighter places cargo on the pier and a second hilo on the pier takes cargo to its designated place of rest. The men who perform this work are paid by the lightermen; the lightermen also own or rent the machinery involved. It is customary for these employees of the lightermen to take cargo up to 100 feet from the point where it enters the pier. Since lighters can be spotted at several points about the pier, it is almost always the case that this place of rest is the final place of rest, and that the cargo is not moved again until it is loaded aboard the vessel—and the opposite considerations apply on import cargo.

The Spencer Company has its own employees who move from pier to pier doing this work. They are commonly called "chenangos," and they are members of the International Longshoremen's Association. In a minority of instances it is not convenient for Spencer to use its own employees for this operation, and the terminal operators are requested to supply labor on a contract basis. When this is done it is not within Tariff No. 2. The terminal operators have no agreement among themselves as to what this charge will be. (See Exhibit 25).

When private lightermen must move cargo between the pier and a lighter, they sometimes arrange to use Spencer's "chenangos," and they sometimes contract with the terminal operators just as Spencer does.

The lighters which are serviced directly to and from vessels are the ones which are covered by our Lighterage

Tariff No. 2. To my knowledge, the lightermen's employees are never involved in this operation, with the exception of a lighter captain, whose function does not include the physical movement of cargo. Instead, several employees of the ship's gang go abroad the lighter and perform there the necessary functions in loading and unloading.

In this proceeding, it is the operators of the private lighters who protest the lighterage tariffs issued by the New York Terminal Conference. As a general rule the private lightermen's craft carry significantly more tonnage than do the Spencer lighters, with the result that the private lightermen are assessed the lower volume rates in Tariff No. 2, and Spencer is charged the higher less-volume rates.

A vessel's gear is like a plumb-line—it can reach directly only one point on the deck of a lighter. In loading the lighter it can deposit cargo at only one point on the deck, unless either the lighter is moved or the vessel's gear is re-rigged. These latter alternatives are usually impractical, so most cargo must be detached from ship's hook at the same spot and then moved to its place of stowage on the lighter. This is one of the functions of our men who are aboard the lighter.

In unloading lighters the ship's hook may be taken a short distance from its plumb-line point, and then when the lifting-power is applied the cargo is dragged a short distance along the lighter deck before it gets into the air. This is possible only on cargoes where such dragging does not result in damage. With the exception of this occasional use of dragging, the unloading of lighters presents the reverse of the problem of loading; there must be either a shifting of cargo aboard the lighter to ship's hook, or a shifting of lighter or gear to reach the cargo.

The same limitations regarding ship's hook apply on the pier, but there we have more room to maneuver, conditions

are safer, and we have the entire machinery of the pier available. Tonnage per hour of a given type of cargo is almost always higher to and from the pier, and in many instances very significantly so.

In some instances we place mechanical equipment, usually hilos, from the pier aboard the lighter. This is done by first lifting the hilo, which may weigh up to ten tons, by ship's gear aboard the deck of the vessel, then re-rigging the gear, then lowering the machine down onto the lighter deck. Our men who work aboard lighters must similarly go from the pier up the ship's gangway, then across the ship, then down a rope ladder over the side of the ship into the lighter.

These operations all require time, and in instances where the ship's gang is concerned, time runs to the magnitude of at least \$116 per hour. Just five minutes of gang time costs about ten dollars, and the comparison of the over-the-side lighter operation with the pier operations shows many such delays.

These, then are the cost elements which Lighterage Tariff No. 2 is intended to recoup: the movement of cargo aboard lighters to get it attached to ship's hook (and to stow import cargo after release from the hook), and to compensate for delay time to the 21-or-more man gang which is caused wholly by the fact that a lighter is being used instead of the pier.

B. The History of the Lighterage Tariff

Nobody seems to know when the practice of charging lightermen for the over-the-side work began. Vague references to the First World War indicate that it is at least that old. At any rate, it is a very old practice; it is a custom of the Port long antedating the issuance of our Tariff No. 1, in 1961.

* * * * *

C. The Costs and Statistics of the Lighterage Service

Stated briefly, there is a cost saving to someone when lighter cargo is handled directly between lighter and vessel. Instead of being handled twice—to the dock and then to the vessel—there is but one handling. One question in this proceeding is who shoud reap the advantage of the cost saving. The two tariffs we have issued, and the many negotiated agreements down through the years, gave some of the saving to both parties. The private lightermen now want to appropriate it all to themselves, and in addition they want some of the fruits of our labor which goes beyond the cost saving. Let me state four general facts:

1. Stevedores are paid by steamship companies for stevedoring this cargo. Almost invariably they are paid at the same rate as if the cargo had moved between pier and vessel.
2. It costs stevedores more to move cargo over-the-side than to move it to or from the dock.
3. Lightermen, on the other hand, incur no handling costs whatever, except for the Lighterage Tariff charges, when the steamship company or stevedore orders cargo worked over-the-side.
4. It costs lightermen almost three times as much to move cargo themselves to or from the pier as it does to pay the Lighterage Tariff rates.

I now turn to the facts to support these four propositions.

Exhibit 23 is a blank form of the stevedoring contract most widely used in the Port of New York. Note that Clause 5 of the form provides:

5. *Income from Handling Lighters and Cars:* The Contractor shall collect and retain its customary charges for labor services in connection with the load-

ing and unloading of railroad cars, lighters, barges, and scows.

(Note also, incidentally, that this form, dated in 1949, speaks of these charges as "customary.")

This provision appears in almost every stevedoring contract in the Port of New York. In some instances, for various practical reasons, the standard form (Exhibit 23) is not used in its entirety, but this provision and others from the standard form are nevertheless copied into such contracts. There are only three instances in the Port where the contract provides that lighterage revenues will be refunded to steamship companies. These are explained in Exhibit 24.

The blank first page in Exhibit 23 constitutes the most vital secret information in this industry. This is where stevedores compete, and the competition is bitter. Several have gone out of business in the five years that I have been here. Our Conference membership has dropped from 41 to 24, principally because of this factor. Those that remain constitute an excellent source of this vital service to the steamship industry, and they bid vigorously for the business. The results of this bidding usually appear on this blank page.

Since these stevedoring charges are so highly confidential, I decided to select only representative charges. I asked one of our members to assume a relatively full vessel, and lots of about 200 tons in that vessel of various commodities. I then asked for a typical stevedoring charge, defining stevedoring as the movement between the place of rest on the pier and the point of stowage in the vessel. The typical charge was to be one that might appear in a contract today, although not necessarily one that does appear in a contract. The stevedoring charge, in short

tons, together with our volume and less-volume rates, are as follows:

Commodity	Stevedoring	Lighterage	
		Vol.	Less-Vol.
(cents)			
steel plates	\$4.91	62	80
copper slabs	5.08	62	80
bagged coffee	7.37	65	80
steel pipe	4.46	62	80
reels of wire	4.46	78	80
bales of wool	7.57(5.65M)	62	80
drums of oil	4.69	47	72
boxed vehicles, K.D.	9.83(5.50M)	65	72
textile machinery	13.39(6.00M)	67	72
unboxed tractors	6.53(4.50M)	67	72
skidded tinplate	4.02	56	72
unboxed chassis	16.07(4.50M)	67	72

From these figures it may be seen that the steamship companies pay from seven to over twenty times as much for the stevedoring service as the lightermen pay for the service of having their craft loaded and unloaded.

We ran a cost study on 120 lighters during the period 20-31 January 1964. A form (Exhibit 20) was sent to all Conference members with a request to have as many as possible completed during that two-week period. Thirteen members complied with the reports on the 120 lighters; the results are compiled in Exhibits 21 and 22.

As Exhibit 21 indicates, 6,998 short tons were handled at a revenue of \$4,947.26, or 70.7 cents per ton. The costs for the operation are divided as follows:

Cost of men on vessel	\$20,024.60
Cost of men on lighter	11,743.61
Other costs due solely to the lighterage operation	3,008.43
 Total	 \$34,776.64

Of these three cost elements, the first is not directly allocable to the lightermen, except insofar as reduced efficiency of the lighter operation delays the men in the vessel; the third is wholly applicable to the lighters. This \$3,008 consists of delay time to the gang while ship's gear and lighters were being shifted, of machine and non-gang labor time on the lighters, and of a few miscellaneous items such as placing tunnage on lighters. None of these costs would have been incurred if the cargo had moved to from the pier.

The second of the three cost elements, above, is not so clearly applicable to one or the other function. These men were part of the ship's gang. If the cargo had been worked to or from the pier, they would have been assigned to the pier. Yet most of what they did aboard the lighters was work which, as we shall show at the proper time, was the obligation of the lightermen.

Not only is this so, but efficiency of work aboard lighters is lower than on the piers. For some commodities this becomes an extremely important factor. On drums, for example, (an item which often comes from lighters) the piers handle twice as many per hour as lighters can. This is because the piers have special machinery for drum cargo which is probably never put aboard lighters. To some extent this difficulty of transferring pier machinery to lighters results in "making-do" without machinery and therefore in making lighterage work less efficient.

Cargo resting on the pier is palletized when this is feasible. This palletizing may have been done by a truck-man, by a lighterman's employees aboard a lighter before placing it on a pier, or by our own pier laborers. The stevedore gang working from the pier is fed this palletized cargo. The same gang working on a lighter in the over-the-side operation must either take the time to palletize aboard the lighter or give up the advantages which palletization offers.

Working space aboard lighters is restricted, with consequent lessening of efficiency in some instances. The men have to go down rope ladders, swinging over the side of the vessel. On windy days, particularly, this is time-consuming and dangerous. And whoever or whatever goes onto the lighter from the pier must later be removed in the same manner.

The terminal operator is responsible for the lighters. Sometimes a passing vessel's wake tears them loose; sometimes there are fires; some have even been sunk. Since the lighterage industry is past its heyday, much of the craft are ancient; claims for broken boards are so common that some terminal operators feel it necessary to make surveys before beginning an operation.

As the lighterage operation has decreased, the skills in loading and unloading them has decreased, and the longshoremen get progressively less efficient. This varies from one area to another in the Port. Hoboken, for example, still has some good lighter gangs; Port Newark does poorly in this regard.

* * * * *

**Exhibit 16. New York Terminal Conference Lighterage Tariff
No. 2 (FMC-T. No. 8)**

II. APPLICATION OF RATES

Rates contained herein are applicable to the service of loading and unloading derrick lighters, covered barges and deck scows (all of which will hereinafter be referred to as "lighters") alongside vessels which are moored at steamship piers within the port of Greater New York operated by the participating terminal operators. The Port of Greater New York includes all area within 25 miles of the Statue of Liberty. Rates herein do not apply to bulk cargo. Services not specifically mentioned in this tariff shall be performed only upon individual negotiation and at rates so negotiated. Nothing contained herein shall be

construed as an offer by the participating terminal operators to perform services without charge.

Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard collection of lighterage detention charges from steamship companies.

The service of loading lighters shall include stowage of cargo aboard lighters in a safe, reasonably efficient manner consistent with the custom and practice in the Port of New York.

The service of unloading lighters shall include whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear.

The terminal operator shall supply all labor and equipment necessary to properly load or unload the lighter.

Mechanical apparatus used on the lighter shall have rubber tired wheels and shall be of such weight and construction as to avoid damage to the lighter.

There shall be no charge for the loading or unloading of single piece of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad.

Volume rates, as used herein, shall apply when 100 or more short tons are transferred between a single lighter and a single ocean vessel. In all other instances the less-volume rates shall apply. Where the weight of cargo is less than 100 tons the lighter owner is entitled to be charged as though the consignment weighed 100 tons, if such charge is less than the otherwise applicable charge.

There shall be a minimum charge of two dollars (\$2.00) for cargo loaded to or from any one lighter.

Rates are quoted in cents per ton of 2,000 pounds, except where otherwise specifically noted.

* * * * *

NEW YORK TERMINAL CONFERENCE—FMC-T. No. 8
Lighterage Tariff No. 2
First Revised Page 4 cancels Original Page 4

Correction No. 1

The service of unloading lighters shall include whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear.

The terminal operator shall supply all labor and equipment necessary to properly load or unload the lighter.

Mechanical apparatus used on the lighter shall have rubber tired wheels and shall be of such weight and construction as to avoid damage to the lighter.

There shall be no charge for the loading or unloading of single pieces of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad.

Volume rates, as used herein, shall apply when 100 or more short tons are transferred between a single lighter and a single ocean vessel. In all other instances the less-volume rates shall apply. Where the weight of cargo is less than 100 tons the lighter owner is entitled to be charged as though the consignment weighed 100 tons, if such charge is less than the otherwise applicable charge.

There shall be a minimum charge of two dollars (\$2.00) for cargo loaded to or from any one lighter.

Rates are quoted in cents per ton of 2,000 pounds, except where otherwise specifically noted.

Issued: July 11, 1966 * * * Effective: July 11, 1966

Exhibit 58. New York Terminal Conference Truck Loading and Unloading Tariff No. 7

NEW YORK TERMINAL CONFERENCE

FMC—T. No. 7
First Revised Page 3
Cancels
Original Page 3

Correction No. 6

ITEM 1. ABBREVIATIONS AND SYMBOLS

All rates are quoted in cents per hundred pounds, unless otherwise noted.

OFBT—open flat bed truck

(AQ) —items which are preceded by this symbol are any quantity rates

(+) —indicates increase of rate (used only in event of change in this tariff)

(-) —indicates decrease of rate (used only in event of change in this tariff)

(*) —indicates change which cannot be categorized as increase or decrease (used only in event of change in this tariff)

ITEM 2. APPLICATION OF RATES

Rates, charges and rules contained herein are applicable to the service of loading or unloading freight to or from trucks which was carried by or is to be received for carriage by common carriers by water in foreign commerce and in commerce to and from territories and possessions of the United States and the service and rates apply onto and from trucks at any commercial pier or waterfront terminal within the Port of Greater New York and Vicinity where the participating Terminal Operator is regularly operating, or where the Terminal Operator may be temporarily operating if at such temporary operation he is equipped to offer the service of loading or unloading trucks.

The Port of Greater New York and Vicinity includes all of the geographical area designated in "The Port of New York District" Map issued by the New York Port Authority.

The rates in Part II of this Tariff (except rates named which are preceded by an "(AQ)") are applicable to single commodities of 10,000 lbs. or more per truck and which do not require the terminal operator to select cargo by individual marks of identification such as chop marks, brands, type, size, etc. If selecting is required, the rates in Part I will apply plus the service charge applicable under "Special Stowage of Trucks".

Whenever a minimum weight is given as prerequisite to a rate herein, the truckman, shipper or consignee with less than said minimum weight will be charged as though the consignment weighed the minimum weight, if such charge is less than the otherwise applicable charge.

ITEM 3. DEFINITIONS

1. Truck Loading

- A. Truck Loading Service shall mean the service of moving cargo from a place of rest on the dock, elevating the cargo onto the truck and stowing of the cargo in the truck, but shall not include special stowage, sorting or grading of, or otherwise selecting, the cargo for the convenience of the trucker or the consignee, nor the loading onto consignee's pallets.
- B. The loading and stowing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

2. Truck Unloading

- (C) A. When the Terminal Operator performs truck unloading, such truck unloading shall mean the service of removing cargo from the body of the truck to the dock, vessel or other terminal facility designated by the Terminal Operator, and shall include sorting by port. Truck unloading shall be performed by the Terminal Operator at the request of the motor carrier.
- B. The unloading of cargo from a truck shall be with the assistance of, and under the supervision of, the driver of the truck.
- C. When the trucker performs unloading service such unloading shall mean the removing of the cargo from the body of the truck to a place of rest adjacent to truck tailgate designated by the terminal operator. When the motor carrier performs unloading he shall not be required to tier cargo more than six feet high.

3. Package

The word "package" shall also include pieces, unpackaged freight units and all articles of any description except goods shipped in bulk.

4. Trans-shipment Cargo

Trans-shipment cargo is cargo moving on through bills of lading from one pier or waterfront terminal for movement by truck to another pier or waterfront terminal for trans-shipment in the Port of New York between a common carrier by water and another common carrier by water.

NEW YORK TERMINAL CONFERENCE

Correction No. 1

FMC-T No. 7
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 Cancels
 Original Page 4

The through freight rate must include the trans-shipment costs and the truck loading and unloading charges are to be absorbed by either the initial carrier and/or the connecting carrier.

Where two or more commodities are moving together on a through Bill or Bills of Lading, the trans-shipment rate is to apply to all commodities on such Bill or Bills of Lading. When a single commodity is being trans-shipped on a through Bill or Bills of Lading, the applicable Tariff rate is to apply.

5. Container Vans

Container vans are re-usable metal vans manufactured and used for the purpose of repeated shipping of freight, enclosed on all sides, with a capacity of at least 275 cubic feet.

(*)ITEM 4. RIGHT TO LOAD OR UNLOAD TRUCKS

Truck loading at any pier or waterfront terminal operated by a participating Terminal Operator at the Port of Greater New York and Vicinity shall be performed solely by such Terminal Operator, his agents, servants and employees at the rates and subject to the rules, regulations and practices contained in this Tariff.

ITEM 5. SAFETY

The motor carrier, shipper or consignee shall provide a vehicle which is adequate and suitable for loading and unloading.

ITEM 6. LIABILITY

The Terminal Operator shall be liable only for damage resulting from his failure to exercise due and proper care in performing the services provided for herein. In no case shall the Terminal Operator be liable for a sum in excess of \$500.00 per package unless the trucker, shipper, consignee or their representatives prior to the commencement of such services, declares a higher value and pays to the Terminal Operator, in addition to the other charges for such services as herein set forth, a premium computed at 1% of the declared value of each package and in such event the Terminal Operator shall be liable for the full declared value of each such package for damage resulting from its failure to exercise due and proper care in performing the services provided for herein.

ITEM 7. MINIMUM CHARGE

The minimum charge for any service rendered shall be \$2.50 per truck and 50 cents for each additional separate bill of lading, dock receipt or delivery order handled. This rule shall not apply to Appraiser's Stores.

ITEM 8. COLLECTION FOR SERVICES RENDERED

1. Unless the shipper or consignee shall have made definite arrangements with the Terminal Operator for the payment of loading or unloading charges, the motor carrier shall assume full responsibility for the payment of the charges for such services.
2. Unless the shipper and/or consignee and/or motor carrier shall have made definite arrangements for credit, all charges shall be paid in cash by the driver who shall be given a receipt therefor.
3. If a motor carrier is extended credit pursuant to the above provision, and fails to pay charges specified herein, the shipper or consignee shall become liable for such charges.

ITEM 9. OVERTIME CHARGES

The rates provided herein are for work performed during normal working hours, i.e., 8 A.M. to 12 Noon and 1 P.M. to 5 P.M., Monday to Friday, inclusive, all holidays specified in the collective bargaining agreement in effect in the Port of New York governing the employment of longshore labor being excepted.

Overtime work, i.e., work performed by truck loading or unloading labor outside of normal working hours, and work on Saturdays, Sundays and all holidays specified in the collective bargaining agreement in effect in the Port of New York governing the employment of longshore labor, except as specifically set forth in Item 10, shall be performed only by mutual consent. If such work is performed for the convenience of the motor carrier, shipper or consignee, a fifty (50) percent surcharge on the applicable tariff rates shall be made.

NEW YORK TERMINAL CONFERENCE

FMC-T. No. 7
Original Page 5**ITEM 10. THREE O'CLOCK RULE**

A truck in line to receive or discharge cargo by 3 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator.

ITEM 11. INADEQUATE MANPOWER ON TRUCKS

When the truck driver does not assist in the loading and stowing of his truck the Terminal Operator shall make a surcharge, in addition to the applicable tariff rate, of \$5.00 per hour straight time, and \$7.50 per overtime hour, the time to be computed on the basis of each 15 minutes or fraction thereof.

When trucks are unloaded without the services of the Terminal Operator's employees, unloading shall proceed at a rate of five tons (10,000 pounds) per hour. When this rate is not maintained a penalty charge of \$1.00 for each quarter hour or fraction thereof shall be assessed for the excessive time.

ITEM 12. HEAVY LIFTS

The handling of heavy lifts in excess of 6,000 lbs. for any single package shall be limited to the capacity of the Terminal Operator's equipment at that location. The tariff rates set forth herein for other than heavy lifts are applicable to single packages weighing 6,000 lbs. or less.

When 26 to 50 heavy lifts are consigned to or from the same vessel for one consignor or consignee, there shall be a 40 percent reduction in the heavy lift charge; when more than 50 are so consigned there shall be a 60 percent reduction in the heavy lift charge.

ITEM 13. PALLETIZING CARGO

Subject to prior arrangement with the Terminal Operator, cargo will be loaded onto consignee's or truckman's pallets at a charge of 4½¢ per 100 pounds (except wine or liquors in single cases or cartons, 1 cent each,) which charge shall be in addition to the charges otherwise provided herein. Such service of palletizing shall consist only of stacking cargo on pallets and shall not include any strapping or otherwise securing cargo to pallet. The charge provided in this item will be assessed irrespective of place where the loading of cargo onto pallets takes place.

ITEM 14. WEIGHING CARGO PRIOR TO AND AT TIME OF DELIVERY

When cargo is required to be weighed on the pier prior to delivery, the Terminal Operator will endeavour to make available the necessary space to permit such weighing to be performed and for the Weighmaster to properly backpile the cargo before the truck arrives to take delivery. Where the cargo is palletized the Terminal Operator will assign lift trucks and operators to make the cargo available to the Weighmaster for this purpose.

The Terminal Operator shall not be required to permit weighing simultaneously with the loading of the truck, unless he has failed to make available to the Weighmaster the space for prior weighing.

The Weighmaster shall be required to properly repalletize cargo which has been palletized and to properly backpile cargo that had not been palletized.

Where a truck in the process of loading is required to make two or more trips to the Customs scale, for the purpose of obtaining separate weights for various lots of merchandise, a fifty (50) percent surcharge shall be made on the applicable tariff rate for loading the entire quantity delivered to the truck. Any overtime for use of the Customs scales for this purpose shall be ordered by and be for the account of the trucker.

ITEM 15. SPECIAL STOWAGE OF TRUCKS

When the truck is loaded in a manner which requires special stowage, handling, sorting, grading or otherwise selecting the cargo for the convenience of the trucker, shipper, or consignee, the Terminal Operator shall make an estimate of the additional time required for such special service and shall make an extra labor charge, in addition to the applicable tariff rate, of \$5.00 per each straight-time man hour and \$7.50 for each overtime man hour, the charge to be computed on the basis of each 15 minutes or fraction thereof.

ITEM 16. DELAY TO MOTOR VEHICLES

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored.

NEW YORK TERMINAL CONFERENCE

FMC—T. No. 7
Original Page 6**ITEM 17. PREREQUISITE FOR SKIDDED RATES**

Wherever rates in Part II of this tariff are based upon cargo being skidded, pre-unitized, or palletized, said rates are applicable in the case of truck unloading only if the cargo is situated on the truck so the terminal's fork-lift truck blades may be directly inserted, without any necessity of shifting cargo prior to such insertion. If the cargo is not so situated on the truck, the Part I rates are applicable.

ITEM 18. OTHER SERVICES

Nothing contained herein shall be construed as requiring a Terminal Operator to perform without charge any service not specifically provided for herein. The charge for any such service shall be mutually agreed upon. Nothing contained herein shall be construed as requiring the Terminal Operator to perform any service other than truck loading or truck unloading.

Oral Argument Before the Commission By Mr. Schlefer

Finding No. 4 says that we are derelict in not publishing a tariff for working lighters to the dock. We should publish a tariff for working lighters to the dock.

This is not a business which we are in. It is the business of the lighterman to unload his lighter to the dock or to load his lighter from the dock. That is his obligation. We are not in that business. He hires Chenango labor, which is a separate local of the ILA, to perform that work, or he does it through Spencer, who employs Chenango labor to perform that work.

I want to get into that labor situation in a minute.

We have other unions, other locals of the ILA, which perform the stevedoring in and out of the ship. We don't load or unload lighters.

Occasionally when there is no Chenango labor available, and the Examiner found this, occasionally when there is no Chenango labor available, why, we let them use our labor on a contract basis, but we merely furnish labor to the lighterman. It is his business. It is his obligation to unload his vessel.

Moreover, if we were required to publish a tariff on this matter, you would have a very serious situation in the Port of New York. And this relates to the labor situation there.

The Chenango labor, which is a local of the ILA, is used, is a specialized local which handles lighters, railroad lighters and private lighters. It gets its name from an upstate port or county where the tugboat people lived, and they would bring their families down the Erie Canal, down the river, and they would unload the barges there, and they were called Chenangoes.

The regular ILA labor loads and unloads vessels and handles other work on the terminal.

We have an exclusive bargaining contract with that union. It involves priorities in the shape up, pensions, and all kinds of things that are inapplicable to Chenangoes, who move from pier to pier.

If we published a tariff, such as the Examiner suggests in Finding No. 4, we would have to perform—we would be holding ourselves out to perform a service, and we would have to do it with some labor. We couldn't do it with the Chenango labor, because we don't have a contract with them. So we would have to do it with the regular ILA labor; and as soon as we did, you would have a port-wide strike. Because the Chenangoes would be deprived of their work. This happened in May of 1964—after the close of this hearing, but it is public knowledge—and you would run into an intolerable situation.

It happened in 1964 for two days when one terminal operator tried to use regular ILA labor, regular terminal labor, to unload lighters. And the Chenangoes started a strike throughout the port and the port was tied up for two days. And if you force us to publish this tariff, I am certain that this would happen generally throughout the port.

* * * * *

Excerpt from Brief (p. 26) of the New York Terminal Conference Before the Hearing Examiner in Docket No. 1153

(e) *Lighter detention.* The lightermen contend that respondents should pay them "reasonable compensation . . . for extra time consumed" when cargo is handled over the side (their brief, p. 13). Respondents pay demurrage on railroad lighters, and the suggestion is made that failure to do so on private lighters is discriminatory.

The fact is that the detention bills of the private lighter-man are turned over to the steamship company, for the reason that the delay involved normally is caused by the carrier rather than by the terminal operator (Gage, R 170). It is respondents' understanding that the private lighter-man's bills for detention are paid by the steamship company (Gage, R 170). Witness Gage requested that the lightermen inform him as to any such bills not so paid by the steamship company (Gage, R 170). No response to this inquiry was received. The inference appears well war-

ranted, therefore, that the steamship companies do pay these charges.¹⁰ Accordingly, the private lightermen are not prejudiced by the terminal operators not doing so.

Excerpt from Reply Brief (pp. 8-9) of the New York Terminal Conference, Before the Hearing Examiner in Docket No. 1153

Lighter detention. In their opening brief, respondents contended that the private lightermen are not prejudiced by the terminal operators' refusal to pay them "reasonable compensation . . . for extra time consumed" when cargo is handled over the side. It was pointed out that the detention bills of the private lightermen are turned over to the steamship companies for payment, and there is no showing that the steamship companies did not pay them (respondents' brief, p. 26).

Hearing Counsel assert, however, that "with some steamship companies [the lightermen's] collection has been unsatisfactory" (their brief, p. 35). They contend it is unreasonable, and in violation of section 17 of the Act, for the terminal operators to have no lighter detention provision in their tariff. (Hearing Counsel's brief, pp. 12, 35, 44)

Hearing Counsel's record reference (R. 1059-60) is to testimony by a lighter witness that he had "run into various objections" to payment of demurrage, and that "I have had one steamship manager tell us that he wasn't going to pay any demurrage and if I persisted in trying to collect it, he would take his business away from us that we are doing." The generality and unspecificity of this testimony falls short of that "reliable, probative and substantial evidence" required to support an order with respect to a violation of the Act. *Port of New York Authority v. Ab Svenska*, 4 F.M.C. 202, 205-206, 208 (1953). It is to be weighed, moreover, against the failure of any lighterman to respond to witness Gage's invitation to submit informa-

tion as to any detention bills not paid by the steamship companies (respondents' brief, p. 26). The lightermen's failure to do so warrants the inference that none was unpaid.

Excerpt from Initial Brief (p. 35) of Commission Hearing Counsel Before the Hearing Examiner in Docket No. 1153

It is obviously not feasible or possible for the lighterman to have a voice in the actual loading or unloading of vessels, but inasmuch as he often experiences detention of his craft for reasons residing entirely within the stevedoring process, it is only proper that he be compensated for his extraordinary costs—in fact it is the position of Hearing Counsel that it is unreasonable for the terminal operators to fail to adopt a lighter detention provision in their tariff. It appears that the lightermen do have detention agreements with some steamship companies but collection has been unsatisfactory in the past (Tr. 1059-1060) and the lighterman is often left to bear the entire cost of detention although the cause is not due to his fault or in any way for his benefit or convenience (Tr. 1055).

**Memorandum from Messrs. May and Schmeltzer
to the Commission**

UNITED STATES GOVERNMENT
FEDERAL MARITIME COMMISSION

MEMORANDUM

Date: April 7, 1964

To: Secretary
From: Managing Director
Subject: Docket No. 1153—Matter of Compliance with
Subpoena

This refers to your memorandum of April 3, 1964, requesting information with respect to specified aspects of Docket No. 1153.

(a) The genesis of Docket No. 1153

The proceeding was instituted by the Commission upon its own motion pursuant to section 22 of the Shipping Act. On June 30, 1960, the Federal Maritime Board approved Agreement No. 8005-3, between the members of the New York Terminal Conference (Conference) modifying the basic agreement which provides for the establishment and maintenance of rates, rules and regulations with respect to truck loading and unloading services in the Port of New York. The substance of the modification was to provide for the fixing of charges for services of *loading and unloading lighters and barges at piers* operated by the parties. The Conference subsequently filed Lighterage Tariff No. 1 which named rates, rules and regulations for the services of *loading and unloading lighters and barges alongside vessels* moored at piers operated by members of the Conference.¹ In addition, the Conference later modified its truck loading and unloading tariff to provide for a truck unloading charge cargo moving direct between truck and vessel.

¹ The Conference later filed Lighterage Tariff No. 2 containing a general increase of approximately 14 percent.

Upon recommending approval of Agreement No. 8005-3, we interpreted the modification to cover the service of loading and unloading lighters to and from the pier rather than between lighters and vessels, where the cargo does not pass over the pier. It is our view that direct movements between truck and vessel and between lighter and vessel were "stevedoring services", as opposed to terminal services.

Moreover, several lighterage companies filed protests against the lighterage tariffs. The protests alleged that (1) the terminals covered by the tariff are not entitled to assess any charge whatever against the lighters or the owners or operators thereof for the services described in the tariff, and (2) the charges in the tariff are unreasonable and discriminatory.

On the basis of the protests filed by the lighterage companies and our view that direct movements between lighterage and vessel were "stevedoring services", we requested that the Bureau of Investigation conduct an extensive investigation of this matter. Based upon the protests and the information contained in the investigative report, we recommended that the Commission set these matters down for investigation.

(b) The development of the proceeding and its present status

The original order in this proceeding was issued on October 10, 1963; pre-hearing conference was held on December 17, 1963; and hearings commenced on March 9, 1964. It is expected that the hearings will be concluded this week.

(c) Who is involved in the proceeding

The respondents in this proceeding are members of the New York Terminal Conference. They consist of terminal operators, stevedores and steamship companies. There are

11 intervenors.² Intervenors, the Port of New York Authority, Empire State Highway Transportation Association, Middle Atlantic Conference and the several lighterage companies are playing an active role in the proceeding.

(d) *What are the major problems involved in the case*

The order in this proceeding set forth seven issues to be considered. They are as follows:

(1) whether Agreement No. 8005, as amended, permits the members thereof to consult and agree with respect to the rates, rules and regulations contained in Lighterage Tariffs No. 1 and 2 or whether the rate-fixing authority granted by that agreement is limited to the fixing of rates only with respect to lighters and barges alongside piers; and whether the practice of assessing charges against lighters alongside vessels may be an unjust or unreasonable practice under section 17 of the Act;

(2) whether Agreement No. 8005, as amended, permits the parties thereto to amend the definition of truck unloading in Truck Loading and Unloading Tariff No. 6, to include the vessel itself as a "place of rest"; whether such definition, if authorized by the conference agreement, may result in an unjust or unreasonable practice in violation of section 17 of the Act; and whether the parties to Agreement No. 8005 engaged in that practice even prior to the amended definition.

(3) whether the failure of the parties to Agreement No. 8005 to file a Tariff including rates assessed against lighters and barges alongside piers (as distinguished from alongside vessels) is a violation of section 15 of the Act and of Article 4 of Agreement No. 8005, as amended.

² City of New York; Export Packers Association; Brooklyn Chamber of Commerce, Inc.; Port of New York Authority; Empire State Highway Transportation Association; Middle Atlantic Conference; Harbor Carriers of the Port of New York; James Hughes, Inc.; Henry Gillen Sons' Lighterage, Inc.; McAllister Lighterage Line, Inc.; Petterson Lighterage & Towing Corporation.

(4) whether the tariffs filed with the Commission by the parties to Agreement No. 8005 state all of the terms and conditions applicable to the services covered by said tariffs; whether any of the terms and conditions go beyond the routine rate-making authority granted by Agreement No. 8005, as amended, and thus require independent section 15 approval; and if so, whether such terms and conditions should be approved, disapproved or modified pursuant to section 15 of the Act.

(5) whether any of the rates, charges, rules or regulations contained in the tariffs filed with the Commission by the parties to Agreement No. 8005 result in any undue or unreasonable preference or advantage or any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

(6) whether any agreements exist between the parties to Agreement No. 8005 and the ocean carriers using their facilities whereby part of the revenues collected from lighter operators is refunded to the carriers; whether such agreements are subject to section 15 of the Act; and whether such agreements violate Article 2 of Agreement No. 8005, which prohibits refunds "in any manner or by any device."

(7) whether any of the rates, rules, regulations or practices of the respondents are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or in any manner violate the Shipping Act, 1916.

Early in the proceeding the trucking interests argued that issues five and seven above were intended to include general truck loading and unloading practices within the Port of New York. The Examiner upheld this argument. During the course of the proceeding the Empire State Highway Transportation Association applied for and was granted a

subpoena requiring submission of all contracts between respondents and steamship companies which involved stevedoring, truck loading and unloading and lighterage loading and unloading rates, rules and regulations. The respondents supplied about eight contracts which they stated were representative of the contracts that exist in the Port of New York. At the insistence of the trucking and lighterage interests, the Examiner found that the respondents failed to comply with the subpoena. The respondents insisted that they had satisfied the subpoena and refused to submit further contracts. It is estimated that between 300 and 500 such contracts may be in existence.

(e) *What are the possible ramifications. For example, is this developing into a consideration of the Commission's authority over stevedores.*

As pointed out above, the view of the Bureau of Domestic Regulation is that direct movements between truck and vessel and between lighter and vessel are "stevedoring services." Generally, it is considered that stevedoring charges are assessable against the steamship company and not the owner of the goods and that such costs to the vessel are taken into consideration when establishing ocean transportation rates. Based upon these considerations, any further charge assessed against the owner of the goods would result in a double charge for a single service.

In an effort to resolve the stevedoring question, hearing counsel and several intervenors are attempting to draw a line to distinguish where stevedoring begins and ends and where the terminal operation begins and ends. In all probability, the Commission will be placed in the position of making this decision and further deciding whether stevedoring services here are subject to our jurisdiction.

4/10/64

Timothy J. May

4/7/64

Initiated by: Edward Schmeltzer, Director
Bureau of Domestic Regulation

Excerpt from Deposition of Timothy O. May, Managing Director of the Commission at Time Hearings in Docket No. 1153 Were Held

By Mr. Schlefer:

Q. Mr. May, do you direct and administer the Bureau of Domestic Regulation? A. Yes.

Q. Does the head of that office report to you? A. Yes.

Q. Do you direct and administer the Bureau of Hearing Counsel? A. Yes.

Q. Does the head of that office report to you? A. Yes.

Q. Do you direct and administer the Bureau of Investigation? A. Yes.

Q. Does the head of that office report to you? A. Yes.

Q. Does the Bureau of Domestic Regulation review informal complaints and protests against the practices, methods and operations of terminal operators and conferences of terminal operators and their tariffs? A. Yes.

Q. Does it from time to time request the Bureau of Investigation to develop additional information and data with respect to those matters? A. Yes.

Q. Does it prepare recommendations in cooperation with the Bureau of Hearing Counsel for formal action and proceedings before the Commision, for the Commission? A. It prepares them for my consideration. I make the recommendations to the Commission.

Q. Right.

Excerpt from Deposition of Edward Schmeltzer, Managing Director of the Commission at the Time of the Commission's Decision Under Review, and Director, Bureau of Domestic Regulation, at Time Hearings in Docket No. 1153 Were Being Conducted

Examination by Counsel for Respondents

By Mr. Schlefer:

Q. What is your name, sir? A. Edward Schmeltzer.

Q. What is your position with the Federal Maritime Commission? A. Director, Bureau of Domestic Regulation.

Q. What are the functions of the Bureau of Domestic Regulation in reference to terminals and terminal operators? A. The Bureau is an initial substantive bureau, which means that it does initial work on matters and makes recommendation to the Commission, through Mr. May, where it is required.

Q. Does it investigate practices, methods, tariffs of terminal operators? A. It is responsible for them being investigated. If there is a complaint, we review it. We may ask for an investigation or to do some investigation work. Basically, the answer to your question is Yes.

Q. Did it perform those functions with reference to the matters which ultimately became the subject of the Commission's order in Federal Maritime Commission Docket 1153? A. The order instituting the proceeding?

Q. Yes. A. Yes.

Q. Did it request the Bureau of Investigation to investigate the matters on review in that docket? A. It requested the Bureau of Investigation to investigate some matters that were under review in that docket.

Q. Did the Bureau of Investigation consult with hearing counsel at any time during, prior to or during the course of the proceeding in Docket 1153? A. I don't know.

Q. Did your bureau work to any extent on the brief with hearing counsel in that docket? A. I don't know again.

Q. Did you attend the Commission's meeting of May 7, 1964, in which the Respondents' Exhibit 2 is an extract of the minutes? A. Yes.

Q. Do you remember what part you played in that meeting? A. No.

Q. Did you prepare the memorandum in initial form that is identified as Respondents' Exhibit 3? A. Yes.

Q. Do you recall whether that memorandum was the subject of discussion in the Commission meeting? A. I don't recall. I can—I think the minutes would indicate that it was. And I would expect that it was.

Q. Do you have any recollection of the subject matter of the deliberations with respect to the respondents in that

proceeding, petition to quash? A. I have actually no actual recollection of that meeting. The only recollection I have of that meeting is from reviewing the minutes, reviewing the memorandum dated April 7, 1964, which Mr. May submitted and I initiated.

Q. Does that recollection extend only to the contents of the memorandum and the minutes? A. I don't understand the question.

Q. Well, I mean they refreshed your recollection, you just testified. A. That's correct.

Q. So what did they refresh your recollection as to? A. As to what is in them.

Q. As to what is in them? A. I have no independent recollection of that meeting of the Commission.

**New York Terminal Conference Truck Loading and Unloading
Tariff No. 7 (Issued: Dec. 17, 1965, Effective: Jan. 17, 1966)**

ITEM 10. RECEIPT AND DELIVERY OF CARGO BY APPOINTMENT

A. Appointments for the receipt and/or delivery of cargo may be obtained by telephoning the individual Participating Member concerned no later than 2 P.M. of the working day prior to the arrival date of the truck or trucks at said terminal facility.

B. Appointments shall not be granted to other than authorized representatives of motor carriers.

C. The hours, arrangements and number of appointments to be granted on any day shall be determined by the individual Participating Member.

D. If, for any reason, a truck is not in all respects ready to commence loading and/or unloading operations at the appointed time, the Participating Member may cancel the appointment for that day.

E. Failure to keep an appointment without good cause, failure to arrive on time for an appointment without good

cause, failure to lodge proper documentation in connection with the shipment and/or consignment, shall, among others, be good and sufficient grounds upon which the Participating Member may rely at any time in refusing to grant appointments to an individual motor carrier.

F. Trucks worked pursuant to an appointment shall be serviced to completion at the applicable straight time rates.

ITEM 11. RECEIPT AND DELIVERY OF CARGO WITHOUT AN APPOINTMENT

Each Participating Member shall make provisions for the servicing of trucks arriving at the terminal facility without an appointment between the hours of 8:00 A.M. and 3 P.M.; provided, however, that no Participating Member shall be required to service such trucks beyond 5 P.M. or beyond the finish of the last "appointment" truck being worked that day. In the event the servicing of a non-appointment truck cannot be completed by the aforesaid time the Participating Member shall so notify the motor carrier at the earliest practicable moment. If, for the convenience of the motor carrier, shipper or consignee, the Participating Member elects to service any trucks beyond 5 P.M. or beyond the finish of the last "appointment" truck, such work shall be subject to the provisions of ITEM 9; provided, however, that in the case of refrigerated cargo only, where the Participating Member is required to continue servicing a truck beyond 5 P.M. to avoid spoilage of the commodity, such servicing shall be at the straight time rates until completion thereof only if the said motor carrier involved therein has lodged the necessary complete and correct documentation with the Participating Member, and all its trucks are available and ready to be serviced by the Participating Member, prior to 3 P.M.

ITEM 12. RESPONSIBILITIES OF MOTOR CARRIER'S EMPLOYEES IN TRUCK LOADING AND UNLOADING

A. When the truck driver does not assist in the loading and stowing of his truck the Participating Member shall

make a surcharge, in addition to the applicable tariff rate, of \$6.00 per straight time man hour, \$8.25 per overtime man hour, and \$10.50 per penalty meal time man hour, the time to be computed on the basis of each fifteen (15) minutes or fraction thereof.

B. When trucks are unloaded without the services of a truckman's helper and without the services of the Participating Member's employees, unloading shall proceed at a rate of five (5) tons (10,000 lbs.) per hour. If the motor carrier's employee fails to maintain the aforesaid applicable rate, the motor carrier shall be required to cease operations and remove the said truck or trucks from the terminal facility. At the option of the motor carrier, however, its employees may continue unloading, in which case a penalty charge of \$3.00 per quarter hour shall be assessed for the period covering the commencement of unloading operations to the completion thereof.

* * *

Effective January 17, 1966, and until further notice:

1. Item 10 (Receipt and Delivery of Cargo by Appointment), Item 11 (Receipt and Delivery of Cargo Without an Appointment) and Item 12-B (Trucks Unloaded by Truckman Without Services of Helper), of Truck Loading and Unloading Tariff No. 7, are hereby suspended.
2. Item 10 (Three O'Clock Rule) and Item 11, second paragraph thereof, (Inadequate Manpower on Trucks), of Truck Loading and Unloading Tariff No. 6, are hereby reinstated.

Issued January 14, 1966

Effective January 17, 1966

**Letter from Commission Secretary Lisi
to Counsel for Petitioners**

FEDERAL MARITIME COMMISSION
WASHINGTON 25, D. C.

July 29, 1966

Mark P. Schlefer, Esquire
Kominers & Fort
Tower Building, 1401 K Street, N.W.
Washington, D. C. 20005

Dear Mr. Schlefer:

Transmitted herewith in accordance with your request of July 15, 1966 are certified copies of:

- (1) Minute entry of October 10, 1963 on which date the Federal Maritime Commission considered issuing the Order of Investigation in Docket No. 1153, and
- (2) Minute entry of May 12, 1966, on which date the Federal Maritime Commission adopted its Report and Order in Docket No. 1153.

Present at the meeting of October 10, 1963 at the time of the voting on the institution of the investigation in Docket No. 1153 were:

Chairman John Harlee
Commissioners Barrett, Day and Patterson
J. L. Pimper, in the capacity of Acting Managing Director
R. E. Mitchell, in the capacity of Acting General Counsel
E. Schmeltzer, Director, Bureau of Domestic Regulation
E. F. Stetson, Special Assistant to Commissioner Day
T. Lisi, Secretary

Present at the meeting of May 12, 1966 at the time of the voting on the adoption of the Report and Order in Docket No. 1153 were:

Chairman John Harlee
Commissioners Barrett, Day, Hearn and Patterson
J. L. Pimper, General Counsel
E. S. Johnson, of the Office of Foreign Regulation
W. Levenstein, of the Office of Foreign Regulation
W. M. Rouse, Special Assistant to Commissioner
Barrett
F. C. Hurney, Special Assistant to the Secretary
T. Lisi, Secretary

The total charge for the enclosed certification is \$1.50.

Very truly yours,

/s/ THOMAS LISI
Thomas Lisi
Secretary

Enclosure

**Extract from the Minutes of the Meeting of the
Federal Maritime Commission**

October 10, 1963

* * * * *

Docket No. 1153—Truck and lighter loading and unloading practices at New York Harbor—Order of Investigation and Hearing.

The Commission considered the matter of entering into an investigation of New York Terminal Conference Lighterage Tariffs No. 1 and 2, and Truck Loading and Unloading Tariff No. 6, transmitted by the Director, Bureau of Domestic Regulation under date of August 23, 1963.

After discussion, by the "yea" vote of Chairman Harlee, Vice Chairman Barrett, Commissioners Day and Patterson,

the Commission determined to enter into an investigation upon its own motion to determine whether:

- (1) Agreement No. 8005, as amended, permits the members to consult and agree with respect to the rates, rules and regulations contained in Lighterage Tariffs No. 1 and 2 and Truck Loading and Unloading Tariff No. 6, F.M.C.—T. No. 7, Item 3 subsection 2;
- (2) the fixing of rates, rules and regulations contained in the above tariffs is contrary to the standards of section 15 of the Shipping Act, 1916; and
- (3) the provisions of the above tariffs are in violation of Sections 16 and 17 of the Shipping Act, 1916;

and directed that an order of investigation thereon be issued and served.

The Commission's Order of Investigation and Hearing, and Notice of Time for Filing Petitions to Intervene, in Docket No. 1153—Truck and Lighter Loading and Unloading Practices at New York Harbor, as served, will be found in the formal docket of this proceeding.

Memorandum dated August 23, 1963, from the Director, Bureau of Domestic Regulation, relative to the above matter is in the files of the Secretary.

**Extract from the Minutes of the Meeting of the
Federal Maritime Commission**

May 12, 1966

* * * * *

Report & Order—Docket No. 1153—Truck and lighter loading and unloading practices at New York Harbor—Violations found—Tariffs to be modified—Proceeding dismissed in part.

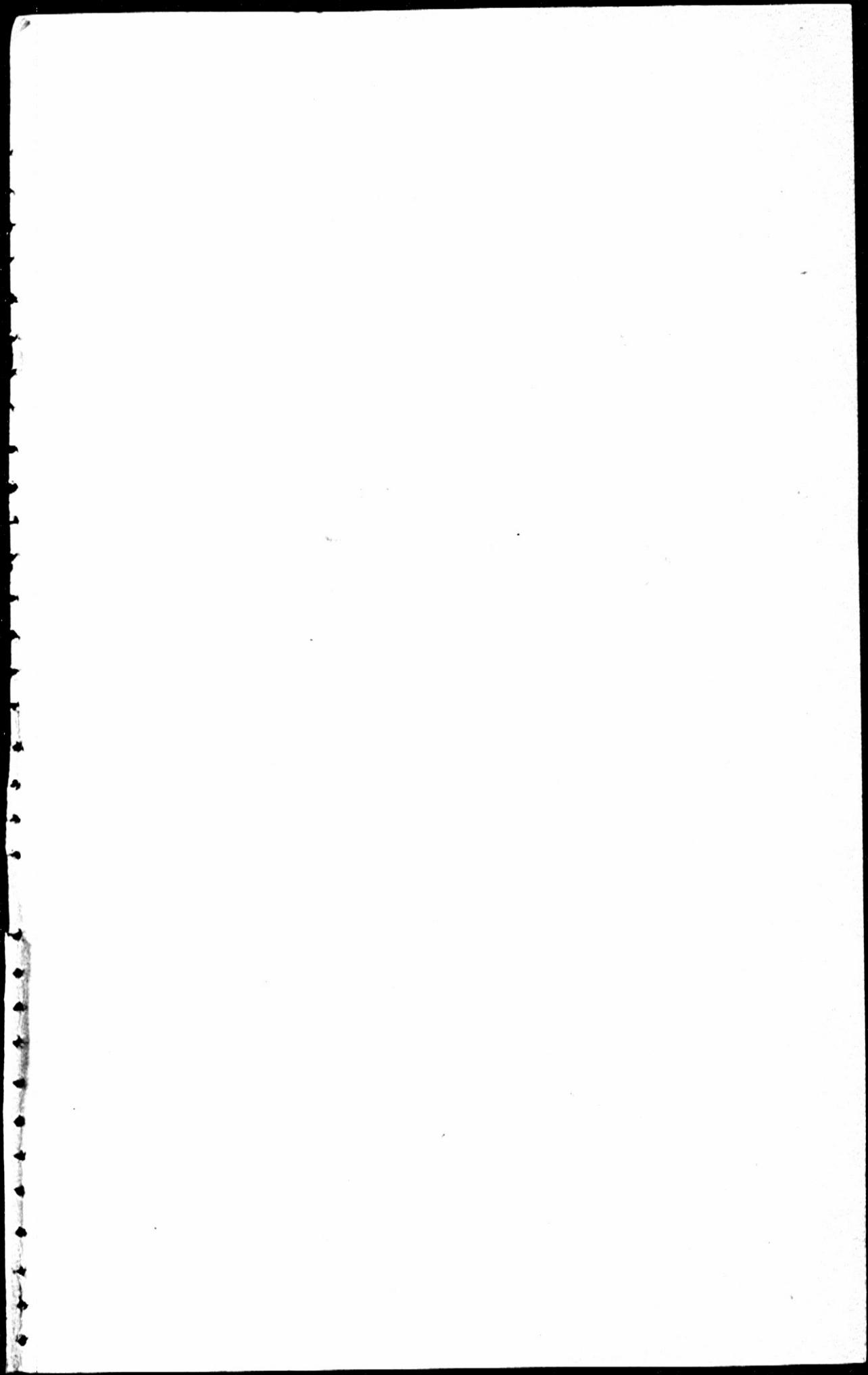
The Commission considered draft Report and Order of the Commission in Docket No. 1153—Truck and Lighter

Loading and Unloading Practices at New York Harbor, which had been prepared pursuant to instructions given at the special meeting on February 28, 1966, copies of which had been distributed to the Commissioners.

The Commission also discussed certain suggestions made by Commissioner Hearn that the Report include a statement that the Commission would direct its staff informally to investigate the ramifications of a proposal made by one of the parties that the cost of truck loading and unloading be borne by the steamship companies.

After discussion, by the "yea" vote of Chairman Harllee, Vice Chairman Patterson, Commissioners Barrett, Day and Hearn, the Commission directed the General Counsel to incorporate Commissioner Hearn's suggestion in the draft Report, and directed the Secretary to issue and serve the Report as so revised, and the Order as soon as feasible. The Report and Order finds that respondents, New York Terminal Conference (an association of 22 steamship companies and terminal operators) have violated Section 16 First and Section 17 of the Shipping Act, 1916; orders them to cease and desist from engaging in the violations; orders them to modify the provisions of their Lighterage Tariff No. 2 and Truck Tariff No. 6; and dismisses the proceeding except for that portion thereof upon which the Examiner reserved decision pending resolution of a related subpoena enforcement proceeding currently before the courts.

The Commission's Report and Order in Docket No. 1153—Truck and Lighter Loading and Unloading Practices at New York Harbor, served May 16, 1966, and Erratum Notice thereto served May 18, 1966, will be found in the formal docket of this proceeding.



QUESTIONS PRESENTED

1. Whether the Federal Maritime Commission properly concluded, in ordering petitioners to make far-reaching changes in their truck and lighter tariffs, that petitioners' tariffs and practices violate section 16 First and section 17 of the Shipping Act, 1916.
2. Whether the additions to and deletions from petitioners' truck and lighter tariffs ordered by the Commission are properly supported by findings and reasons as required by the Administrative Procedure Act; whether they are void for vagueness and ambiguity; and whether they exceed the Commission's statutory powers.
3. Whether the proceedings before the Commission are void in that they constituted an exercise of the Commission's rule-making authority and did not comply with the requirements for rule making in the Administrative Procedure Act.
4. Whether in the proceedings before it the Commission failed to comply with the provisions of Section 5(c) of the Administrative Procedure Act, and failed to accord petitioners due process of law.
5. Whether petitioners' motion for a full evidentiary hearing and for leave to adduce additional evidence should be granted.

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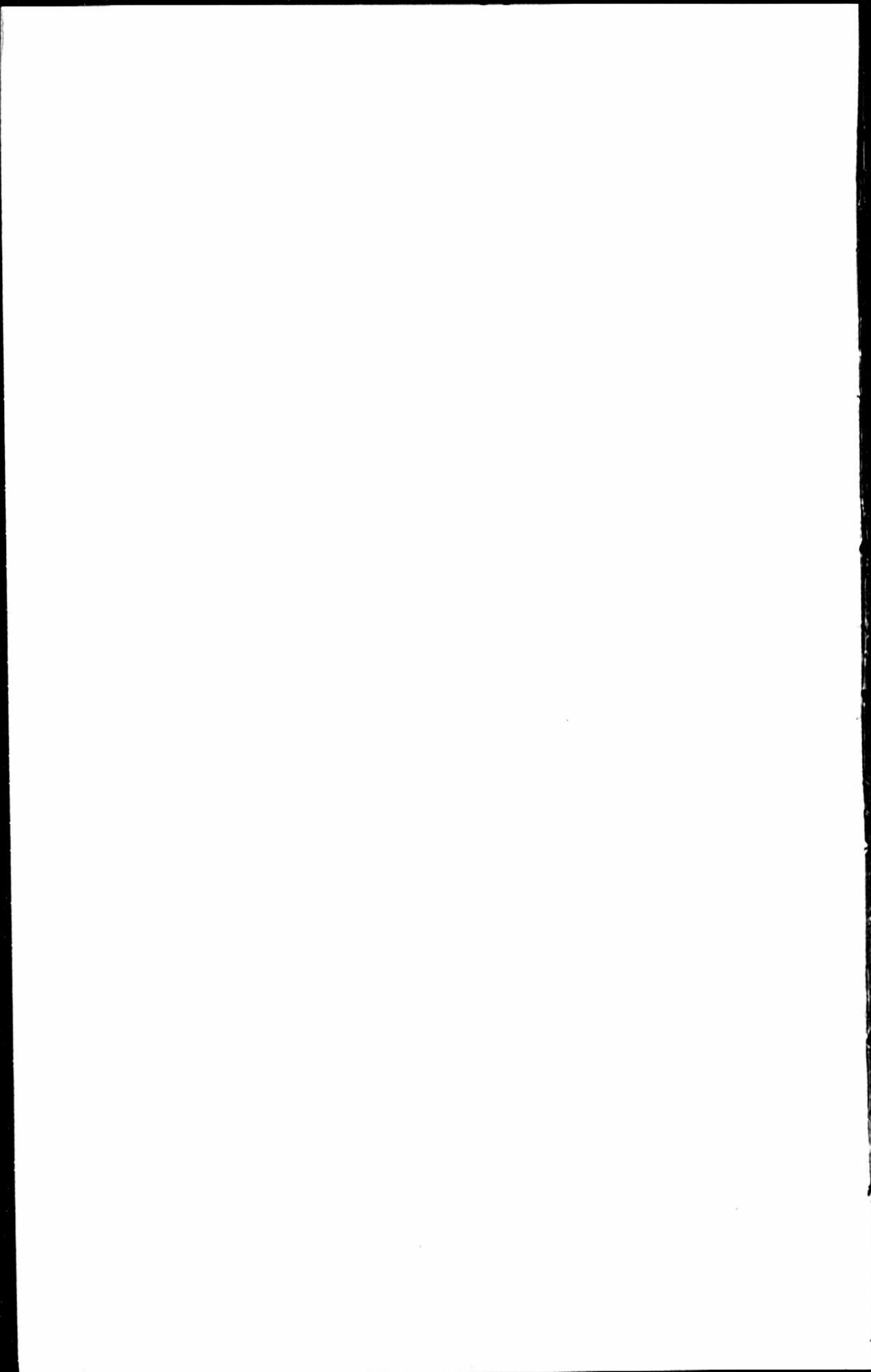
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petition for Review of an Order of the
Federal Maritime Commission

BRIEF OF PETITIONERS

JURISDICTIONAL STATEMENT

Petitioners here, respondents before the Commission, are the members of the New York Terminal Conference, an association of companies who operate terminal pier facilities in New York harbor in connection with common carriers by water. They seek review of a final order and report of the Federal Maritime Commission served May 16, 1966, in FMC Docket No. 1153. The Commission held that petitioners violated section 16 First and section 17 of the Shipping Act, 1916, 46 U.S.C. §§ 815, 816. The United States Court of Appeals for the District of Columbia Circuit has jurisdiction of petitions for review of final orders of the Federal Maritime Commission under the

Shipping Act, 1916, by virtue of the Review Act of 1950, 5 U.S.C. § 1031.

In connection with the issue of whether the Commission failed to comply with the requirements of § 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c), and of procedural due process, there is pending before the court petitioners' motion for a full evidentiary hearing and for leave to adduce additional evidence (JA 102). The court ordered this motion held in abeyance, pending the hearing of this case on the merits, on October 31, 1966. Because the relief requested was not granted, petitioners have been able to present only such evidence as they are presently aware of in the discussion of this issue in Part VII of this brief. Petitioners believe that the evidence presented is only part of that actually in existence bearing on this question, and accordingly hereby renew their original motion, over which this Court retained jurisdiction in its ruling on the motion.

STATEMENT OF THE CASE

Petitioners are companies who operate maritime terminals—piers—in New York Harbor, and who are associated in the New York Terminal Conference. This Conference operates under a Conference Agreement, FMC No. 8005, approved by the Commission, which permits the Conference to establish reasonable rates and regulations covering the loading, unloading and storage of waterborne cargo.

With respect to ocean vessels loading or unloading goods at the piers, the terminal operators enter into negotiated stevedoring contracts with the steamship companies, under which the terminals using their own employees, perform the services of loading or unloading the vessels.

Cargo is brought to or from the pier primarily by trucks, but a small percentage—approximately 2%—is handled by lighters and barges which transfer cargo between the pier and some other point in the harbor area. In connection with movement of cargo by truck and lighter, the Conference has filed truck and lighterage tariffs with the

Commission pursuant to Agreement No. 8005, *supra*. These tariffs have been revised from time to time and new tariffs issued.

On October 10, 1963, the Commission ordered an investigation to determine whether any of the rates, rules, regulations or practices of the Conference members with respect to truck and lighter loading or unloading practices at New York violated the provisions of sections 15, 16 or 17 of the Shipping Act, 1916, 46 U.S.C. § 801. Pursuant to the order of investigation, the matter was assigned to a hearing examiner and hearings held. The hearings began before Hearing Examiner Jordan on March 9, 1964, and ended April 9, 1964. The members of the Conference were named individually as respondents to the Order of Investigation. There were also a number of intervenors, including those intervening in these review proceedings, plus others, such as the Port of New York, the City of New York, and Wm. Spencer & Co.

Following the hearings, Hearing Examiner Jordan issued an initial decision. On exceptions duly filed, the matter was presented to the Commission, which rendered its Report and Order (variously referred to in this brief as "order", "decision" and "opinion") on May 16, 1966. On June 28, 1966, the Conference members filed with the court their petition for review of the Commission's order.¹

As the stipulated issues indicate, the order under review pertains to several specific areas of terminal operation.

¹ When the Commission issued the order under review it reserved one issue for later determination. That issue involved the relatively minor question of whether, under any of the stevedoring contracts between the terminals and steamship companies, the terminals are required to turn over to steamship companies revenue which they receive from lighter companies for loading and unloading lighters moored alongside vessels owned by the steamship company in question; and whether, if so, such arrangements violate the Shipping Act. When the examiner issued his initial decision, litigation in the form of a subpoena enforcement action was pending, involving this issue. Ultimately, following two unsuccessful attempts by the Commission to enforce subpoenas in the U.S. District Court for the District of Columbia, and following its order under review here, the Commission determined to take no action with respect to this issue. We do not except to this supplemental order, which in any event is not involved directly in these review proceedings.

These are set forth in detail in the Argument herein. With regard to trucks, the principal area involved is the problem of delay experienced by trucks at the piers and whether the piers should be held liable for this delay. Another issue is whether the Conference may provide in its tariff that trucks arriving before 3:00 p.m. will be serviced after normal hours at straight-time rates only if terminal personnel are permitted to assist with unloading. The remaining areas of terminal operation relevant here concern lighters: whether terminal operators may charge a lighter company at the tariff rate for stevedoring the lighter when it is moored alongside a vessel and loads or unloads directly to or from it; whether the terminal must publish a tariff of charges for stevedoring lighters tied up alongside the pier itself; and finally, whether the pier operator must, without charge, pay lightermen for delay caused by steamship companies, and seek such reimbursement from the steamship companies as might be available in separate subsequent negotiations or legal actions.

The tariffs to which the Commission's order is addressed are petitioners' Truck Loading and Unloading Tariff No. 6 (referred to as Truck Tariff No. 6 or as petitioners' Truck Tariff), and Lighterage Tariff No. 2. (JA 161, and 158, respectively). However, as the Commission recognized in its order (JA 81), Truck Tariff No. 6 has been cancelled and superseded by Truck Tariff No. 7 (JA 176). A number of changes were effected by Truck Tariff No. 7, including an appointment system whereby trucks will be able to make appointments for loading or unloading cargo at the terminals at fixed times.² (See also JA 75).

Finally, as indicated above, in addition to the order of the Commission there is under consideration here a motion filed by petitioners for a full evidentiary hearing and for leave to adduce additional evidence on issues involving § 5(c) of the Administrative Procedure Act and due process.

² Operation of this major new provision was superseded by petitioners at the Commission's request, following a request made to the Commission by intervenors.

STATEMENT OF POINTS

A. The Federal Maritime Commission erred in its determinations that:

1. Petitioners must draft and adopt a truck detention rule in their Truck Tariff, making them liable for truck delays unless the delay is outside the control of petitioners.
2. Petitioners must delete the condition from their "Three O'Clock Rule" that the rule will not apply where trucks are unloaded without the services of the terminal operator.
3. Petitioners may not publish charges in Lighterage Tariff No. 2 for stevedoring lighters over-the-side of ocean vessels.
4. Petitioners must publish tariff charges for stevedoring lighters moored along side the pier.
5. Petitioners must pay detention claims of lighters regardless of whether the detention was caused by steamship company.

B. The order as a whole is void for lack of findings and reasons, and is unenforceable for vagueness.

C. The Commission failed to comply with the requirements of § 5(c) of the Administrative Procedure Act and of due process in conducting the proceedings before it.

SUMMARY OF ARGUMENT**I. THE COMMISSION ERRED IN RULING THAT THE TERMINAL OPERATORS MUST DRAFT AND INCLUDE IN THEIR TRUCK TARIFF A PROVISION WHEREBY THEY COMPENSATE TRUCKERS FOR UNUSUAL DELAYS CAUSED BY OR UNDER THE CONTROL OF THE TERMINALS.**

There is no disagreement that truck congestion and delay at piers on the New York waterfront is a serious problem. The Commission found, however, that it is "virtually impossible" to determine the cause of truck delay in any given instance. This is inconsistent with the Commission's directive that petitioners must nevertheless assume

liability for truck delay unless they were not at fault, and renders the directive arbitrary and improper.

The order is further arbitrary and improper in that there are no findings made or reasons given to support it, as required by § 8(b) of the Administrative Procedure Act. The Commission merely concludes, without disclosing why, that *regardless* of the causes of delay, trucks have a "right to get better handling." Further, in concluding that petitioners must bear liability for truck delay the Commission determined that an appointment system instituted in the Conference's new Truck Tariff No. 7 was irrelevant, since the Commission stated it was not concerned with the causes of delay. This rejection of petitioners' solution is arbitrary, since no findings were made with respect to the appointment system, or as to why it is irrelevant, and the statement that the causes of delay are not at issue is contrary to numerous expressions of concern over the causes of truck delay elsewhere in the order. Moreover, if the causes of delay are not at issue, as the Commission said, then its order to petitioners to draft a detention rule is without purpose or support.

The order is also void and unenforceable for vagueness and ambiguity. It requires petitioners to draft a rule with no direction as to what provisions the rule should contain as to burden of proof, the meaning of delay, the method of determining compensation, the procedure for ruling on claims, and other provisions, wholly apart from any direction as to how fault shall be determined. Nor is the truck detention order within the Commission's statutory powers under section 17 of the Shipping Act, 1916, which is referred to by the Commission as the basis for the order. Truck delay is not a "practice relating to or connected with the receiving, handling, storing, or delivering of *property*." (Emphasis added.)

Further, in determining that the Conference should draft and publish in their tariff a truck detention rule, the Commission was clearly exercising its rule-making authority, as "rule" is defined in the Administrative Procedure Act. The Commission did not, however, follow the prescribed

procedure for rule making set forth in that Act to the detriment of petitioners who, in a rule-making proceeding, could have raised questions as to the vagueness and ambiguity of the proposed rule. The order to draft a truck detention rule is also invalid because the Commission improperly failed to consider the economic effects of such a rule, which subject the terminals to potentially unlimited liability.

Finally, the order is arbitrary and an abuse of discretion since it expressly orders petitioners to draft a truck detention rule "whatever may be the difficulties." Such an order by its terms is unlawful since it applies even if compliance is impossible or unreasonably difficult.

II. THE COMMISSION ERRED IN ITS HOLDING THAT PETITIONERS' "THREE O'CLOCK RULE" MUST APPLY EVEN WHERE THE TRUCKER UNLOADS HIS OWN TRUCK.

The Three O'Clock Rule in Truck Tariff No. 6 provides that where a truck presents itself at the pier before 3:00 p.m. it will be serviced even after regular hours at straight-time rates, but only if terminal personnel are permitted to assist in unloading the truck. The Commission's determination that this condition is unreasonable is arbitrary in that it lacks supporting findings and disregards the plight of the terminal operator. He cannot be expected to keep checkers and labor at the pier after working hours waiting to check and move cargo from where the truck is to a place of storage, while the driver unloads at any pace he wishes. Moreover, the Commission's order undercuts the appointment system, since in Truck Tariff No. 7, the rule is much different and applies only to refrigerated cargo without appointment (JA 177). Under the Commission's order, regular trucks could presumably fail to make appointments and still insist on being serviced at any hour so long as they appeared before 3:00 p.m. In this connection, the Commission's conclusion is void for vagueness, since it is impossible to tell whether, and to what extent, it applies to the current tariff, Truck Tariff No. 7.

III. THE COMMISSION ERRED IN DETERMINING THAT PETITIONERS MAY NOT PROVIDE IN THEIR LIGHTERAGE TARIFF FOR CHARGES TO LIGHTERMEN WHEN TERMINAL PERSONNEL STEVEDORE LIGHTERS MOORED ALONGSIDE VESSELS.

The Commission determined that since the terminal operators are under a contractual obligation to stevedore ocean vessels, if they are allowed to charge tariff rates to lighters loading or unloading directly to or from a vessel there would be a "double charge." This conclusion is based upon the Commission's premise that petitioners have not established that there are extra costs involved when lighters are worked over-the-side of vessels. The Commission ignores Rule 10(o) of its own Rules of Practice in this respect, which places the burden of proof here on the Commission. Petitioners do not have to establish that there are extra costs; rather the Commission must establish the contrary. Moreover, petitioners clearly established by uncontradicted testimony in the record that there are numerous factors involved in over-the-side stevedoring that make it more expensive.

Further, there is no double charge in any case, since the standard form of stevedoring contract between terminal and vessel expressly provides that the terminal will retain the revenue from loading and unloading lighters, and this retention by the terminal is taken into account in determining the contract price. Stevedoring lighters therefore does not result in a double recovery or "charge." However, if the Commission's order stands, the lightermen will receive a windfall, since their charges to the cargo include loading and unloading the lighter, and they would be relieved of this obligation where the lighter is worked over-the-side.

IV. THE COMMISSION IMPROPERLY CONCLUDED THAT PETITIONERS MUST PUBLISH TARIFF RATES FOR LOADING AND UNLOADING LIGHTERS TO AND FROM THE PIER.

The Commission here orders petitioners to publish a tariff which is unlawful even under the Commission's own decisions. The Commission's ruling permits peti-

tioners to apply the tariff rates only "to the extent such services are performed", and this fails to comply with the requirement that conditions under which the tariff will apply must be clearly set forth.

Moreover, the order creates an obvious and unlawful discrimination. The Commission recognizes that nearly all stevedoring of lighters at pierside is performed by Wm. Spencer & Son, at rates negotiated with the lighter. The Commission has shown no justification for holding that the terminal operators, who, according to the Commission, rarely stevedore lighters, must publish a tariff of charges while Spencer may continue to charge whatever the traffic will bear. The Commission made no findings which logically support, or even suggest, its determination here. Further, the Commission has ignored the reason why petitioners do not wish to undertake this business. Currently "Chenango" labor, a separate local of the International Longshoremen's Association, does the work of stevedoring lighters at the pier. Were terminal personnel, who are ordinary longshoremen, to do the work, a portwide strike would be practically certain to occur. Such a strike occurred in 1964 when a terminal operator attempted to engage in this type of work other than at times when no other means were available.

V. THE COMMISSION'S ORDER THAT PETITIONERS MUST PAY LIGHTERS FOR THEIR DETENTION CLAIMS AGAINST STEAMSHIPS IS UNLAWFUL AS IS ITS ORDER THAT PETITIONERS INCLUDE A SIMILAR CLAUSE IN THEIR TRUCK TARIFF AND ASSUME LIABILITY FOR DETENTION CLAIMS OF TRUCKERS AGAINST STEAMSHIPS.

The Commission's determination is wholly without supporting findings. It rests entirely on the conclusion that the experience of lightermen in collecting detention charges against steamships has been "unsatisfactory." But the only support in the record for this is the testimony of one individual that he experienced difficulty in collection. Further, during the hearings the Conference through its Chairman invited any lighter companies with unpaid detention claims against steamships to come forward, and none

did. The Commission's conclusion thus has no substantial support in the record, and the Commission has not sustained its burden of proving that collecting detention has proved unsatisfactory.

Further, the determination is improper because it is vague and unenforceable, and because it is hopelessly confusing when read in connection with the Commission's order that truck detention claims against steamships must be treated in the same manner under petitioners' truck tariff as lighterage claims are treated under the lighterage tariff. No findings were made with respect to truck claims, and, moreover, the Commission appears to indicate in its discussion that petitioners are required only to put in the truck tariff the *present* lighter detention provision, which is the very provision ordered changed.

VI. THE COMMISSION'S DECISION IS VOID FOR VAGUENESS; IT CANNOT BE COMPLIED WITH OR ENFORCED; AND ITS VARIOUS ORDERS AND CONCLUSIONS FAIL TO MEET THE REQUIREMENTS OF § 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT.

This objection goes to the order as a whole, which is replete with inconsistency, a lack of findings with respect to many of the determinations made, and a pervasive confusion and vagueness in many instances as to what the Commission actually decided. The order is not capable of being enforced, since under the Shipping Act such an order is enforced by means of an injunction issued by a United States district court and the order fails to meet the requirements set forth for injunctive orders by Rule 65(d) of the Federal Rules of Civil Procedure.

VII. PETITIONERS' RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND THEIR RIGHTS TO PROCEDURAL DUE PROCESS WERE VIOLATED IN THE COURSE OF THE PROCEEDINGS BELOW AND THE COMMISSION'S ORDER IS RENDERED VOID THEREBY.

The Commission, in conducting the proceedings before it, failed to comply with the requirement of § 5(c) of the Administrative Procedure Act that hearing examiners may not be under the supervision or direction of staff members

having investigatory responsibility. Shortly before the proceedings began, the Commission reorganized the staff and made the Office of Hearing Examiners subject to the Managing Director, who also supervised all investigating departments of the Commission. The Commission amended this order shortly after the hearings ended, but even under the amended order, the hearing examiners are still under the control of the Managing Director.

Further, staff members who engaged in the investigation participated in, and advised the Commission with respect to, its decision. At the meeting at which the Commission adopted its order, two members of the Office of Foreign Regulation were present, along with J. L. Pimper, the General Counsel. All report to and are subordinate to the Managing Director, who admitted on deposition that he participated in the investigation of the case. Further, Mr. Pimper was Acting Managing Director of the Commission when the order of investigation was approved by the Commission and was present at the meeting at which it considered and voted upon the order.

Finally, the proceedings before the Commission were vitiated by ex parte communication concerning the case made to the Commission by members of the staff. The Managing Director and the Director of the Bureau of Domestic Relations sent a memorandum to the Commission setting forth, *inter alia*, their views as to how the stevedoring of lighters over-the-side issue (III, *supra*) should be decided. No copy of this was served on counsel for petitioners here, respondents before the Commission, even though the hearings had been in progress nearly a month, in violation of Rule 10 (dd) of the Commission's Rules of Practice and of § 5(c) of the Administrative Procedure Act.

ARGUMENT

I. THE COMMISSION ERRED IN RULING THAT THE TERMINAL OPERATORS MUST DRAFT AND INCLUDE IN THEIR TRUCK TARIFF A PROVISION WHEREBY THEY COMPENSATE TRUCKERS FOR UNUSUAL DELAYS CAUSED BY OR UNDER THE CONTROL OF THE TERMINALS.

A major portion of the testimony taken at the hearing below concerned delays experienced by trucks at piers on the New York waterfront. That such delays take place and that congestion exists is not disputed. Nor is it disputed that what can reasonably be done should be done to facilitate the exchange of cargo between trucks and ocean carriers at piers in New York harbor.³ But the problem of pier congestion, like the overall problem of traffic congestion in greater New York, of which it is a part, is one of massive overuse of facilities—in the case of terminals, of overuse of piers that are generally old—by thousands of large trucks whose number was never anticipated when the piers and adjacent streets were built.

Petitioners in their truck tariff specifically provide that the pier is not responsible for loss due to truck delay. They cannot reasonably be expected to provide otherwise, since the number of trucks coming to the docks to pick up or deliver cargo makes delay a commonplace, daily experience. Petitioners' disclaimer of liability is consistent with the Commission's findings concerning delay, both in prior decisions and in that under review here. In *Empire State Highway Transportation Association v. American Export Lines*, 5 F.M.B. 565 (1959), cited with approval by the Commission here (JA 78) on a different issue, the Federal Maritime Board discussed the causes of pier congestion in New York harbor:

“Respondents operate about 125 piers in the port of New York, varying in size, physical facilities, and age. Most of the piers are of the finger type and were

³ To this end petitioners have proposed a truck appointment system, discussed later in this section, designed to confine the number of trucks at the piers at a given time to those actually being serviced, and eliminate the necessity of trucks waiting in line for long periods of time to be loaded or unloaded.

constructed at a time when the largest percentage of cargo on the piers moved by lighters and the balance by horse-drawn vehicles. The piers were not designed to accommodate the large number of trucks which now call at the terminals to load or unload cargo. Some of the Staten Island piers have facilities for rail cars, but there are little or no such facilities in Manhattan or Brooklyn. The great preponderance of cargo must therefore be moved to and from the piers by trucks and lighters. This fact underlies practically all of the terminal and trucking problems about which this proceeding revolves

The principal factor affecting the efficiency and cost of the operation is the physical character of the piers themselves, described heretofore. The lineup for trucks at one pier is some three blocks away. At another it is immediately outside.

There is congestion on the piers due to the amount of cargo piled on them. This affects the maneuverability of the trucks within the pier. Because of such congestion and the large number and size of modern trucks, much of the loading is done outside the pier area, on land adjacent to the pier, or sometimes on the street. This area is called the 'farm.'

Truckers send a wide variety of truck types to the terminals and often the truck will not be suitable for the job at hand. Some arrive with documents not properly executed, requiring time for straightening out. Consignees very commonly leave cargo at the piers until the last day of free time, causing a great convergence of trucks and resulting congestion five days after a ship discharges. Some congestion, too, arises from hold-on-dock cargo, i.e., export cargo from inland points consolidated at the terminal for ocean shipment.

Involved in the movement of cargo from ship's tackle to the truck are the terminal operators, the longshoremen who work for the terminal operators, the motor carriers, and the teamsters who drive the trucks. *Any inefficiency, carelessness, or assertion of claimed rights by any one of the parties will fundamentally affect the efficiency, and the consequent costs, of the whole operation."* Id. at 569-80. (Emphasis added.)

Moreover, in its decision under review here, the Commission specifically made the finding that:

"Truck detention is a more complex problem. It is virtually impossible to determine responsibility for truck delay because of the many and varied factors which may or do contribute toward a particular instance of delay." (JA 74. Emphasis added.)

Nevertheless, *despite this finding*, the Commission stated that it agreed with the hearing examiner that "*irrespective of the causes of delay* the truckers have a right to get better handling" (emphasis added) and ordered the terminal operators to put into their truck tariff a rule "which will compensate the truckers for unusual truck delays caused by or under the control of the terminals." (Order, JA 75.)

This direction is, of course, completely inconsistent with the Commission's finding that determining responsibility for truck delay in any given instance is "virtually impossible." While it is evident from the portion of the decision set forth immediately below that the Commission recognized the predicament in which its order places petitioners, by ordering the "virtually impossible," it still insisted that petitioners comply:

"Whatever may be the difficulties in drafting a detention rule which takes into account those causes of delay which are beyond respondents' control, the truckers have a right to the rule, and section 17 demands it." (JA 75. Emphasis added.)

The Commission's truck detention order is improper and invalid on a number of grounds. Except for (G), which has already been considered, these are summarized and discussed below:

- A. The truck detention order is contrary to the findings.
- B. The truck detention order is arbitrary in that it fails to give findings and reasons as required by the Administrative Procedure Act, with regard to both the order itself and to the Commission's determination that petitioners' appointment system is irrelevant.

- C. The truck detention order cannot be understood and is void for vagueness and ambiguity.
- D. The truck detention order exceeds the Commission's statutory powers.
- E. The truck detention order constitutes an exercise of the Commission's rule-making authority, without complying with the procedures required by the Administrative Procedure Act.
- F. The order disregards its effect.
- G. Read in conjunction with the finding, the order on its face is arbitrary, capricious and an abuse of discretion, since it orders an act to be done in deliberate disregard of whether it proves unreasonably difficult or impossible. This is evident from the portions of the order set out above and accordingly is not included in the discussion following:

These arguments, particularly (B), (C), (D) and (E), apply to other conclusions of the Commission discussed in this brief as well. While petitioners have generally raised each applicable objection separately with respect to each issue, they have not always done so, in the interest of avoiding repetition and keeping the length of the brief within the allowed limits. Accordingly, petitioners request the Court to consider that each of these arguments, (B), (C), (D) and (E) are made with respect to each issue herein, unless plainly inapplicable.

A. The Truck Detention Order Is Contrary to the Findings

The inconsistency between the Commission's order to draft a truck detention rule on the one hand, and its finding that the cause of truck delay is nearly always incapable of determination on the other, alone renders the order improper. While this is plain from the order itself, we nevertheless call attention to recent decisions of this Court rejecting conclusions of the Commission which were at odds with the basic findings.⁴

⁴ In these cases, as here, the defect of inconsistency is interwoven with failure to make supporting findings, and although it is clear from these cases that inconsistency is a fatal defect, the discussion is merged with the failure to make proper findings.

In this Court's recent decision in *Aktiebolaget Svenska Amerika Linien v. FMC*, 122 App. D.C. 59, 351 F.2d 756 (1965), the court rejected a Commission conclusion inconsistent with its own findings. There the issue involved a shipping conference rule embodied in an agreement under Section 15 of the Shipping Act requiring unanimous consent in certain matters involving travel agents. The Commission had concluded that the rule prevented travel agents from rendering effective service and placed steamships "at a competitive disadvantage *vis-a-vis* the airlines." Id. at 759. The Court held that the conclusion that the unanimity rule was the cause was improper, since in its findings the Commission had found economic factors responsible: it required a much longer time to sell sea space than it did to sell air space and, further, several years experience was necessary before a steamship passage salesman became proficient.

Likewise, the Commission's order here is similar to the order of the Commission's predecessor, the Federal Maritime Board, which this Court struck down in *Royal Netherlands S. S. Co. v. FMB*, 113 App. D.C. 62, 304 F. 2d 938 (1962). There, one issue was whether certain ocean carriers had willfully aided a shipper in falsely classifying items of glassware as jars to obtain a lower rate. The Board had found:

"There is no evidence that any of the glassware items shipped were ever shown to officials of the carriers to obtain a decision as to the proper tariff rating *The carriers relied on the shippers' description of the property . . .*" 304 F. 2d 938, 942. (Emphasis added.)

Despite the finding above and in portions not quoted that the carriers had no inkling of any sort that cargo was falsely labeled, the Board decided the carriers were nonetheless guilty of willfully abetting a false classification because they did not make their own investigation. In setting aside the Board's order, this Court made it clear that it considered the conclusion inconsistent with the findings; after quoting the Board's findings, the court

said, "having so found, the Board nevertheless decided the carrier had violated Section 16." Id. at 304 F. 2d 938, 942. (Emphasis added.)⁵

We do not think the obvious needs further belaboring: that an order which is inconsistent with the finding which purports to support it is invalid. Not only is it a classic case of arbitrary agency action and an abuse of the agency's discretion, but in such a situation the order necessarily lacks findings supporting it. We turn next to this issue.

B. The Commission's Truck Detention Order Is Arbitrary in that It Fails To Give Findings and Reasons as Required by the Administrative Procedure Act, with Regard to Both the Order Itself and to the Commission's Determination that Petitioners' Appointment System Is Irrelevant.

Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007, provides, with respect to agency rulings and decisions:

"All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

This mandate has not been followed here: there are no findings and, of course, no reasons (beyond that the truckers are entitled to better treatment) to support the Commission's direction to petitioners, the only applicable finding being inconsistent with the order as discussed above. Nor are there reasons given for the Board's conclusion.

⁵ There was less inconsistency in *Royal Netherlands Steamship Co.* than here. There the Board's ultimate determination was based upon its inference that total reliance placed upon the shipper by the carriers constituted a willful avoidance of the means of discovering the true facts with respect to the cargo. While nothing in the findings justified this inference, the findings were not diametrically opposed to the Board's order as is the case here. To match this case, the Board in *Royal Netherlands* would have had to have made a finding of fact that the carrier had not intended willful violation, in which case its conclusion that such an intent did exist would have created an inconsistency as bald as that in the present case.

These omissions render the order improper, under both the plain language of § 8(b) and the cases in which the section has been applied. The Commission's action falls squarely within the language used by the Supreme Court in its 1962 decision in *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, holding an ICC order improper:

“There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to, and the *Administrative Procedure Act* will not permit us to accept such adjudicatory practice.” (Emphasis added.)

Likewise, this Court has made it clear, not only in cases dealing with administrative agencies generally, but in cases specifically involving the Federal Maritime Commission, that the Commission must adhere to the requirement that it make adequate supporting findings and that it set forth the reasons for its conclusions. In *Aktiebolaget Svenska Amerika Linien v. FMC*, 122 App. D.C. 62, 351 F. 2d 756 (1965), referred to in the previous section, this Court found that the Commission had failed to make proper supporting findings or give otherwise adequate reasons justifying its ultimate findings with respect to the unanimity rule discussed above. This Court said:

“We must remand the order . . . to the Commission . . . to make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of . . . commerce . . .”
351 F. 2d 756, 760.

In *Government of Guam v. FMC*, 117 App. D.C. 296, 329 F. 2d 251 (1964), two determinations of the Federal Maritime Commission were declared invalid by this Court on the ground that there were no findings to support them adequately. There the Commission had allocated overhead expense on the basis of voyage expense for the purpose of rate determination and also had made a determination that voyage expenses were the most accurate measure of determining working capital for purposes of computing

the rate base. In rejecting this first determination, the Court said (at 329 F.2d 255):

"... rate fixing is for the Commission and not for the courts. However, there is a judicial duty of review . . . and . . . the reviewing authority is entitled to know—indeed must know—the basic data and the whys and wherefores of the Commission's conclusions."

This Court also struck down the second conclusion:

"The Commission made no findings and stated no conclusions to support its reason for applying the formula used."

Indeed, this Court and other U. S. courts of appeal have repeatedly held that the Federal Maritime Commission and its predecessors failed to make basic findings and give reasons for their conclusions. In addition to the cases discussed above, see: *Trans-Pacific Freight Conference of Japan v. FMB*, 112 App. D.C. 290, 302 F.2d 875 (1962); *Commonwealth of Puerto Rico v. FMB*, 110 App. D.C. 17, 288 F.2d 419, 420 (1961) ("The Board did not say why it adopted market value as a rate base or why it rejected Puerto Rico's contention that this base is grossly excessive The Board 'should make the basis of its action reasonably clear. We cannot find that it did so here.' "); *Pacific Far East Line, Inc. v. FMB*, 107 App. D.C. 155, 275 F.2d 184, 196 (1960) ("The Board has disclosed no basis for its finding"); In *Anglo-Canadian Shipping Co., Ltd. v. FMC*, 310 F.2d 606 (9th Cir. 1962), the U. S. Court of Appeals for the Ninth Circuit likewise held invalid a Commission determination on the ground that the Commission had ignored the requirements of § 8(b) of the Administrative Procedure Act: "What the Commission here and apparently counsel for the Commission and for the intervenors, as well, have forgotten is this requirement of basic findings." Id. at 615. The Court further stated, "It will be noticed also that § 8(b) . . . requires not only findings, but 'supporting reasons' for such findings. These are wholly lacking here." Id. at 616. It emphasized that the requisite findings and supporting

reasons must be set forth with "clarity and completeness" (citing *Colorado-Wyoming Co. v. FPC*, 324 U.S. 626, 634 (1945) and that the basic findings must be specific and definite (citing *Florida v. U. S.*, 282 U.S. 194, 213-15). Referring to this Court's opinion in *Saginaw Broadcasting Co. v. FCC*, 68 App. D.C. 282, 96 F.2d 554, 563 (1938), the Court said (at 617): "The absence of required findings is fatal to the validity of an administrative decision," and it made clear that these requirements must be met "regardless of whether there may be in the record evidence to support proper findings." See also *Melody Music Co. Inc. v. FCC*, 120 App. D.C. 241, 345 F.2d 730, 733 (1965).

Another instance in which a Court of Appeals rejected an order of the Maritime Commission or its predecessor because it was not adequately supported by the findings was in *Baltimore & O. R.R. v. United States*, 201 F.2d 795 (3d Cir. 1953). There the Court faced an order of the Federal Maritime Board directing railroads to grant more free time to shippers during which time cargo discharged at piers owned by the railroad could remain without charge. In the course of its decision, the Court set out in detail the findings which were made by the Board. We quote at some length from the Court's opinion because the parties and issues involved are remarkably similar: both involve trucks, cargoes and ocean terminals, and both involve questions relating to practices involving delay alleged to be prohibited by section 17 of the Shipping Act. The findings and conclusions in the two cases can thus be easily compared. As the portion quoted below shows, the defective order in the *Baltimore and Ohio* case contained far more in the way of supporting findings than are present in the order under consideration here, both with respect to truck detention and other determinations as well:

"We find fact conclusions on the business of the truckers, on the number of piers in Philadelphia, on the two-day allowance of free time by the railroad and other piers in Philadelphia, also the point at which free time begins. The findings of fact tell us the type and condition of the Philadelphia piers owned by the railroads and the charge made by them for top

wharfage. We learn that there is normally no business relation between truckers and railroad representatives on the pier. We read that respondents bill shippers or consignees for pier storage charges; we learn how trucks are loaded and the hours during which they can be loaded and the way in which shippers are notified of the expected arrival of ships for export cargo.

We are likewise given a finding that a substantial part of truck cargo is regularly unable to be removed within the two-day period, and that the piers handle a very substantial amount of truck cargo. It is found that respondents have solicited vessels to load and discharge at their piers in anticipation of freight business from this operation. The fact is found that there has been no unjust discrimination in allowance for rail cargo and truck cargo. And there is no discrimination with respect to top wharfage charges as between railroad and truck cargo.

The statements just set out we find categorically stated in narrative form in the course of the report of the Board.

But out of these findings we do not see a basis for a conclusion that the railroads have imposed unreasonable regulations in violation of Section 17 of the Shipping Act. We have read in the testimony the account of the troubles of the truckers and the rebuttal to that testimony given by the respondents. But it is not our function to find whether the picture is as black as the truckers have painted or free from blots and blemishes as the respondents' witnesses would have the trier of the facts believe. And on this and similar pieces of testimony *the only help we get from the report is the overall conclusion at the end which, as will be seen as we set it out, is almost as general as a verdict of a jury from whom special findings have not been asked.*" Id. at 798-9. (Emphasis added, footnotes omitted.)

Moreover, the Commission's rejection of petitioners' proposed solution of a truck appointment system lacks required findings and reasons, and is arbitrary. The Commission recognizes that the terminal operators have proposed an appointment system to eliminate, so far as this can be done, many of the problems of truck delay. (JA 75, 176-7) By this system, as noted above, a truck intending

to deliver or pick up cargo at a pier would first make an appointment. A truck scheduled for an appointment, if it appeared on time, would be serviced promptly. The Commission's rejection of the appointment system as a means of coping with delay *was not made on the basis of a finding that the appointment system constituted an inappropriate solution*; in fact, there were no findings made at all with respect to the appointment system, even though it was in the record before the Commission and is included in Tariff No. 7. The Commission's conclusion was based upon the assumption that "respondents are correct in their assertion that an 'appointment system' will solve practically all the problems of delay." (Order, JA 75). In a statement which can only be termed incredible in the context of the congestion problem at the piers, the Commission then stated: "The issue here is what the trucker may reasonably expect as redress when delays occur, *not what may be done to remove the causes of delay. The latter is another problem entirely and . . . is not at issue here.*" (JA 75). (Emphasis added.)

The Commission's view that the appointment system is irrelevant presumably explains why the Commission felt it could safely neglect making any findings concerning its suitability. *But the Commission must, under § 8(b) of the Administrative Procedure Act, give reasons for its conclusion that the appointment system is irrelevant, beyond its mere statement to that effect.* This is particularly true since the conclusion that the Commission is not interested in the causes of delay is inconsistent with the rest of the opinion and with the truck detention order itself. When first discussed, truck delay and congestion are presented as serious problems which ought to be cured:

"The record shows that there is congestion and excessive delay in truck loading at the piers . . . Delay is perhaps the greatest single problem involving truck traffic . . ." (JA 66).

Again, in its justification immediately preceding its truck detention ruling, the Commission speaks solely in terms

of the causes of delay, indicating that whatever rule it proposes will be addressed to solving the problem. And the truck detention ruling itself is nonsensical unless it aims at bettering the situation deplored by the Commission.

The foregoing not only establishes that the Commission failed to give reasons supporting its conclusion of irrelevancy; it also shows that this determination is plainly wrong in light of the Commission's own statements as to what the truck delay issue involves. The appointment system as a solution was irrelevant to the proceedings below only if curing the truck delay problem was also irrelevant. Since the Commission's decision on its face shows plainly this is not the case, then the appointment system was not irrelevant and the Commission was obligated to make findings and give reasons *relating to the appointment system's suitability*. It could not, as it did, reject it out of hand.

The Commission's summary rejection of petitioners' appointment system is a wholly arbitrary act, the ultimate effect of which is to favor an unworkable, disruptive and unreasonable plan—terminal liability for delay—over one which is addressed to the real problem: too many trucks for the facilities at one time. The appointment system aims at controlling, by use of rewards for trucks making appointments, the number of trucks at the docks at a given time. It thus works on the only aspect of the problem susceptible of relatively easy change. To paraphrase the Commission, the proposed appointment system has a right to get better handling than it has had from the Commission in this case.

C. The Order Cannot Be Understood and Is Void for Vagueness and Ambiguity.

The truck detention order is also invalid because it is vague and cannot reasonably be understood. Petitioners are asked to draft a rule which "must acknowledge causation"—whatever that means—and "exonerate" the terminal for unusual delays which it cannot control. Nothing is said about whether the measure of liability is common law money damages obtained through an appropriate civil

suit by the trucker against the terminal, or whether some different arrangement is envisioned or permitted.

Nor is the term "unusual delay" clear. Trucks must anticipate some delay at piers, but when does "reasonable" delay end? And what does "exonerate" mean? That the terminal must pay claims and seek recovery later? Further, what tribunal decides whether damages lie or how much they should be? If the state court, the terminal could be plagued to death by a host of minor claims involving drawn-out litigation and the consequent needless expense, which in the end will fall upon the public. On the other hand, the Commission has no machinery to handle such claims.

Nor is there any guide as to who bears the burden of proof, a vital question, inasmuch as clear proof of causation will—as the Commission found—normally be impossible to gather. The order leaves this issue in confusion. Need the trucker prove only delay, and require the terminal to prove the delay was not under its control? The financial burden on the piers could be astronomical, were it the piers' task to literally exonerate themselves.

Lastly, the term "under the control" of the terminal may mean normal liability with fault, but it need not. The longshoremen working for the pier may be under the terminal's control, but may commit many acts causing delay which are not realistically acts over which the terminal has actual control.

In short, aside from all its other defects,

"the Commission has not explained its decision with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Secretary of Agriculture v. United States*, 347 U.S. 645, 654 (1954).

D. The Truck Detention Order Exceeds the Commission's Statutory Powers.

This order exceeds the Commission's powers under section 17 of the Shipping Act, 1916. The order of the Commission states that the failure to provide for a truck detention rule along the lines indicated is a violation of section 17. That section, so far as it is pertinent here, provides:

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of *property*." (Emphasis added.)

The failure of the terminal operators to provide in their tariff for payments to trucks for delay is not a "practice" relating to or connected with receiving handling, storing or delivering *property*. Truck detention would be a payment to the truck not the cargo. The truck has a fixed tariff rate for carriage of cargo irrespective of delay at the piers. Payment of truck detention would not in any way inure to the cargo. Settlement of accounts between connecting transportation agencies (here terminal and truck), is not within section 17. Further, the attempt by the Commission to characterize the terminal operators' omission to provide a truck detention rule as a "practice" is at variance with its own decisions. In *J. M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416 (1962), the Commission stated (at 419):

"The unjust and unreasonable practices condemned by section 17 are those, in the words of the statute, 'relating to or connected with the receiving, handling, storing, or delivering of property.' The practices that are intended to fall within the coverage of this section are shipping practices. *It is these practices and only these that were assigned to the special expertise of the Agency.* Thus, it might be an unreasonable practice for respondent to negligently stow bricks on a high shelf so that they repeatedly fell on the heads of complainant and others. The injured persons would undoubtedly have causes of action against respond-

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ent in a court of law, but it could not be seriously contended that this practice would constitute a violation of section 17 even though it is unjust and involves the storing of property. It has been held, to give another example, that claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the act.”⁶

E. The Truck Detention Order Constitutes an Exercise of the Commission's Rule-Making Authority, and the Commission Failed To Comply with the Procedures Required by the Administrative Procedure Act.

The prescription by an agency of a tariff rule is rule making as defined in § 2(c) of the Administrative Procedure Act, 5 U.S.C. § 1001.⁷ See *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 318 I.C.C. 593 (1962), when a truck detention rule in a motor carrier tariff was in issue, and the Commission held:

“This is a rule-making proceeding governed by Section 4(a) of the Administrative Procedure Act, which requires that notice of proposed rule making shall include, among other things, ‘(2) reference to the authority under which the rule is proposed.’”

Section 4 of the Administrative Procedure Act, 5 U.S.C. § 1003, requires that general notice of proposed rule making be published in the Federal Register or served personally upon all interested parties. No such notice of proposed rule making was published or served upon petitioners. Further, the notice required by § 4 must include a statement of the nature of the rule making proceedings,

⁶ The Commission, in holding that not being responsible for truck delay is a “practice” adopted the truckers argument. This argument, in turn, appears to stem from the fact that in *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 318 I.C.C. 593 (1962), the ICC refused to allow truckers to provide for detention at terminals in their truck tariff. Their claim here is merely a roundabout way of achieving this goal.

⁷ Section 2(c) provides that “rule making” is the agency process for formulation of a rule. “Rule” is defined as “any agency statement of general . . . applicability and future effect . . . and includes the approval or prescription for the future of . . . facilities [etc.] . . . or practices bearing upon any of the foregoing.”

a reference to the authority under which the rule is proposed and notice of "either the terms or substance of the proposed rule or a description of subjects and issues involved." Lack of such a statement has been held by this Court to render the rule void. *American President Lines, Ltd. v. Federal Maritime Board*, 115 App. D.C. 187, 317 F.2d 887 (1962). Nor does the truck detention rule which the Commission would require fall within any statutory exception.⁸

The objection that the Commission failed to follow the prescribed rule-making procedures is not merely technical. Petitioners here, as respondents below, were thrust into what purported to be investigatory proceedings. In the course of the proceedings below, following general testimony relating to delay and congestion on the New York waterfront, the Commission suddenly came up with a rule whose implications are staggering without indicating in advance that it was proposing to require such a "rule." Further, the rule required is vague and uncertain. The protections in § 4 of the Administrative Procedure Act are designed to protect parties such as petitioners from being put in this position. Had the rule-making procedure been followed, the vague and uncertain nature of the rule, such as who bears the burden of proof, and the inconsistency between finding and rule would have been disclosed before the Commission adopted it.

In short, the Commission here, as elsewhere in its opinion (lighter detention, for instance) was clearly exercising rule-making authority. Since in doing so it did not follow required procedures, the order must be set aside.

⁸ Intervenor Empire State Highway Transportation Association has argued in its pleadings here that § 5(c) of the Administrative Procedure Act is inapplicable because the proceedings under review here constitute rule making. Intervenor Middle Atlantic, the principal respondent in *Detention of Motor Vehicles, supra*, has likewise argued here that these are rule-making proceedings. See reply of Empire State Highway Transportation Association, Inc. to petitioners' motion for full evidentiary hearing and other relief, September 22, 1966, at 2; answer of Middle Atlantic Conference to petitioners' motion for evidentiary hearing and other relief dated September 19, 1966 at 2.

F. The Commission's Truck Detention Rule Disregards Its Effect.

Nowhere in its decision does the Commission indicate any awareness of the consequences of its order. Yet its effects could have an enormous financial impact on the terminals. Under the tariff provisions required by the Commission—to the extent they are understandable—the terminals' potential liability to truckers is astronomical. It could disrupt the entire pattern of relationships and practices in the port of New York. The Commission may not so cavalierly ignore, as it has here, the commercial effect of its decision. As the Supreme Court said of the Interstate Commerce Commission in *Burlington Truck Lines v. U. S., supra*, 371 U.S. 156, 172-4 (1962):

“The Commission . . . should have been particularly careful because of the possible effects of its decision . . . the Commission must act with a discriminating awareness of the consequences of its action. It has not done so here.”

II. THE COMMISSION ERRED IN ITS HOLDING THAT PETITIONERS' "THREE O'CLOCK RULE" MUST APPLY EVEN WHERE THE TRUCKER UNLOADS HIS OWN TRUCK.

The Commission determined that Item 10 in petitioners' Truck Tariff No. 6, the “Three O'Clock Rule”, was an unjust and unreasonable practice under section 17 of the Shipping Act. The Three O'Clock Rule provides:

“A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator.”

The Commission viewed this as objectionable unless it were made to apply to “cases where the trucker unloads his own truck”; the rule was seen as a device to make truckers use terminal personnel. (JA 80).

This conclusion, too, is devoid of the supporting findings and reasons required by § 8(b) of the Administrative

Procedure Act. While the Commission's determination is improper on this basis alone, it is also factually wrong: the rule is in the tariff to protect the terminal operator from having to bear the added costs he necessarily incurs when he services trucks after normal closing time. He is willing to do this if the truck arrives before 3:00 p.m., but he considers—understandably—that he must have some control over the time it takes to unload the truck (JA 126). The Commission's order is arbitrary. Truck cargo is unloaded wherever on the dock the truck happens to be; not only must a checker be present to certify the delivery, but the goods delivered must be removed from the right of way to their place of storage. The order would compel the terminal, no matter what the hour, to stand by helplessly, tying up checkers and other labor at overtime wages for a potentially indefinite period, while the driver unloads the truck at whatever rate—however slow—he may desire. (JA 126-130).

It is also arbitrary in that it fails to give adequate consideration to petitioners' proposed appointment system for trucks. The Commission, at page 18 of its decision, specifically acknowledges that Truck Tariff No. 6, which contains the Three O'Clock Rule set out above, has been superseded by Truck Tariff No. 7, which contains a much different Three O'Clock Rule. The new rule is limited to trucks *without* appointments. If a truck does not make an appointment, the terminal operator has no obligation, under the new rule, to service the truck beyond 5:00 p.m., or until the time when the last appointment truck is loaded or unloaded except for refrigerated cargo appearing before 3:00 p.m. which must be unloaded to avoid spoilage. The Commission's failure to address itself to this new rule renders its order moot, since the tariff considered, along with its three o'clock rule, is no longer in existence. If the order is not moot, and is held to apply to the new rule, it is arbitrary since, *inter alia*, it undermines the entire appointment system with no findings made or reasons given. Applied to the new rule, the order appears to require that a truck could either make no appointment, or fail to appear at the time designated, and still insist on being serviced so

long as it arrived before 3:00 p.m., and this, regardless of whether the driver or his helper transferred the cargo themselves.

In addition to lacking requisite findings and reasons, the order is void for vagueness and ambiguity. It is impossible to determine from the opinion whether the Commission meant to confine its determination to the old rule, or, since it mentions the change, meant it to apply to the new rule as well. If the latter, how does the ruling relate to the ✓ appointment system? Again the Commission has failed to state with required clarity what its order means.⁹

III. THE COMMISSION ERRED IN DETERMINING THAT PETITIONERS MAY NOT PROVIDE IN THEIR LIGHTERAGE TARIFF FOR CHARGES TO LIGHTERMEN WHEN TERMINAL PERSONNEL STEVEDORE LIGHTERS MOORED ALONGSIDE VESSELS.

Petitioners' Lighterage Tariff No. 2¹⁰ provides for rates applicable where cargo is transferred over-the-side between a steamship and a lighter moored alongside, the work of transferring the cargo being done by terminal labor. This type of loading or unloading lighters is one of two ways lighters are stevedored. As the opinion states (JA 63): "Lighters are worked in two basic ways—to the pier and over-the-side. When worked to the pier, cargo is loaded to or unloaded from the lighter with the pier as the place of immediate origin or destination of cargo. Over-the-side or direct transfer refers to the practice of mooring the lighter alongside the vessel with cargo passing directly between the two and never coming in contact with the pier." (Footnote omitted.)

Lighters transfer but a small percentage of the total cargo handled, approximately 2%, with trucks accounting for most of the remaining 98%. On those occasions when lighters do come to the pier to take on or discharge cargo,

⁹ This violates § 8(b) of the Administrative Procedure Act in that it fails to set forth "the appropriate rule, order, sanction, relief, or denial thereof" as the section requires. It also violates the judicial mandate of clarity, Secretary of Agriculture v. United States, 347 U.S. 645, 654 (1954); Melody Music Co. Inc. v. FCC, 120 App. D.C. 241, 345 F.2d 730 (1965).

¹⁰ JA 158.

by custom of the port they are directed either alongside the pier or alongside the vessel, at the discretion of the terminal. Lighters, as carriers, are charged with the duty to pick up or discharge their cargo, as the case may be, and their charges to shippers necessarily include this service. Until this case, no one has questioned the obligation of lightermen to pay the costs of loading and unloading the lighters, regardless of the lighters' location. We specifically refer to the practice of assessing charges for direct transfer between lighters and ocean vessels, which has prevailed since World War I (JA 153) and which far antedates the establishment of the Conference and the issuance of a lighterage tariff.

The Commission and the lightermen continue to recognize that where the lighter is directed alongside the pier the lighter must pay the costs of loading or unloading. Indeed, as discussed in detail in Part V below, they insist that petitioners publish tariff charges for stevedoring lighters at pierside. However, where the lighter is directed alongside a vessel, and the cargo is transferred directly between vessel and lighter, the Commission determined that the lighter need pay no charges whatever, regardless of the expense to the terminal operator whose employees load or unload the lighter. And it reached this conclusion with *no discussion whatever* of why the lightermen were being relieved, in this situation, of their duty to bear the costs of handling their cargo. In fact, the opinion does not even appear to recognize that the lightermen *are* being relieved of this obligation.

The Commission focused instead on the fact that the terminal operators have stevedoring contracts with the steamships; it concluded that factually no extra work—or costs—was involved when the terminal operator worked cargo over-the-side, and that as a result there was a “double charge”. This, in turn, led the Commission to hold that henceforth a lighter moored alongside a vessel has the right to receive free service in loading or unloading its cargo.

It should be emphasized that the Commission's holding is *not* based on petitioners' rates being unreasonable, since the contrary was found to be true. The Examiner found that the rates charged by the Conference for working lighters over-the-side are not unreasonable, JA 57, and the Commission did not dispute this finding. The Commission is therefore in the posture of saying that *any* rate, however low, which the lightermen have to pay for stevedoring over-the-side is a violation of section 17 of the Shipping Act, 1916.

This incredible order is invalid for a number of reasons. First is the complete absence of findings and reasons, as required by § 8(a) of the Administrative Procedure Act, for the conclusion that lightermen should be relieved of their ✓ duty under these circumstances to handle their cargo, and also for the conclusion that the burden should fall entirely on the terminal operators. As indicated above, there is not even token recognition on the Commission's part that the lightermen are being so relieved, and a fortiori there are no findings or reasons. Except for the lack of inconsistent findings, the defect here is virtually the same as the Commission's failure to furnish findings to support its truck detention rule, and we incorporate here our discussion of this point beginning at page 15, *supra*.

Likewise, the order exceeds any powers granted the Commission under section 17 of the Shipping Act, or any other statute. Obviously, a discriminatory rate is not involved, since the charges were found to be reasonable in amount. Equally obviously the order does not relate to "practices, relating to or connected with the receiving, handling, storing, or delivering of property." It does not concern the cargo at all, and, as is the case with respect to truck detention, the order in no way benefits the shipper or any person having an interest in the cargo. Nothing in section 17 empowers the Commission to issue a blanket order compelling the terminals to perform free work for lighters regardless of how onerous or costly doing such work may be.

The Commission has also repeated its errors made with respect to truck detention in that the order here consti-

tutes rule making without compliance with the rule making procedures. "Rule" is defined in the Administrative Procedure Act as including the "prescription for the future of rates . . . prices, facilities . . . services . . . or practices bearing upon any of the foregoing." § 2(c), 5 U.S.C. § 1001. This clearly fits the Commission's ruling here. In this connection, reference is made to the discussion of rule making in the preceding section, at 26.

In addition to the above, the Commission cannot sustain its premise, essential to its conclusion that there is a double charge, that the terminal operator incurs no additional costs when he stevedores a vessel over-the-side. The Commission has not sustained this premise because it has offered no evidence, nor referred to any, to support it. The Commission, not petitioners, has the burden of proof. Rule 10(o) of the *Rules of Practice and Procedure, Federal Maritime Commission* provides:

"(o) *Burden of proof* (46 CFR 502.155). At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 Rule 5(g), the burden of proof to show that the suspended rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. *In all other cases, the burden shall be on the proponent of the rule or order.*" (Emphasis added.)

Similarly, § 7(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. § 1006, provides: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

Petitioners were not required in the proceedings below to put on witnesses, or introduce evidence in the form of exhibits, to show that over-the-side stevedoring entails, or in a given case may entail, additional costs to the terminal operator. It was the task of the Commission, as proponent of the rule or order, to establish that there are no costs. Nevertheless, petitioners did come forward, and made every effort to explain why, in the nature of the two stevedoring operations being compared, over-the-side han-

dling is usually more expensive. The Commission in its opinion (JA 71) sets out some of the factors which the testimony showed produces these higher costs. Having summarized petitioners' contentions, the Commission advances four reasons for its conclusion that the costs in the two operations are nonetheless the same:

- 1) "The record does not support the contention that such additional expenses do in fact exist."
- 2) "Respondents' supporting exhibit included a cost analysis which included a strike period and, accordingly, is unsatisfactory."
- 3) "The exhibit [presumably the same exhibit—unnamed—as in (2)] also shows that certain of the costs are pure estimates without any proper foundation for them."
- 4) "Lightermen intervenors also showed that *several* of the alleged extra expenses are in fact compensated for and included in the charge made to the steamship company." (Emphasis added.)

None of these objections constitute any *affirmative* proof ✓ that the costs are no greater when a vessel is worked over-the-side, and on this ground alone the Commission's key proposition falls. Nor, however, are they even persuasive objections against the evidence put on by petitioners. Taking the above item by item, (1) is plainly wrong if it purports to summarize the other three objections which followed it in the opinion. Items (2) and (3) deal with but a single exhibit, and item (4) by its terms covers only "*several*" allegations. The first objection is also plainly wrong if it is meant to imply that petitioners' contentions have no record support. We quote below the Commission's summary of these contentions which the Commission said the record did not support, except that we have included in brackets the references to the Joint Appendix which support them.

"Some of the added expenses in direct loading of lighters, as against working cargo to or from the pier, stated by respondents are: lower productivity [JA

149], less working space [JA 158], necessity to break cargo out of stow on the lighter resulting in slow operations [JA 124], less utility of mechanical equipment [JA 157], re-rigging of gear for working over-the-side (some \$80) not compensated in the stevedoring rate [JA 116], idle gang time while uncovering the hatch on hatch lighters [JA 121], and shifting lighters [JA 152]." (For cumulative references see JA 114-124, 146-150, 151-8.)

It is evident that, contrary to the Commission's unsupported assertion, the record is replete with uncontradicted testimony that numerous factors—those set out above and others also—operate to make working over-the-side more costly.

The remaining three items in the list of the Commission's objections speak for themselves. We are not sure to which exhibit the Commission is referring—possibly exhibit 21, which was a cost study of some lighters worked over the side. Nor are we certain which expenses are referred to in item (4). Presumably this statement refers to provision 2(e) in the form stevedoring contract used frequently by terminals and steamship companies. This provides that the terminal-stevedore will "shift gangs as required between inshore and offshore [e.g., where the lighter is moored], also from lower to upper floor (or vice versa) on double deck piers. Shift lighters into working position after they have been placed alongside vessel, when this can be done without tugs." As the Commission candidly admits, these by no means cover all the extra work, set out above, which working over-the-side involves. Moreover, it is *not* work for which the steamship pays. The Commission, in a classic example of a misleading omission, failed to state that paragraph 5 of this same contract provides:

"5. *Income from Handling Lighters and Cars:* The Contractor [terminal] shall collect and retain its customary charges for labor services in connection with the *loading and unloading of railroad cars, lighters, barges and scows.*" (Emphasis added.)

The price which the steamship company and terminal arrive at for stevedoring therefore *takes into account* the fact that while the terminal operator will do certain work

involved in handling lighters, *he will keep the revenues.* In reality, the situation is the opposite from that suggested by the Commission: the steamship company is *not* paying the terminal operator to perform the work referred to, and, in fact, the steamship company has its price reduced thereby.

The upshot is that the Commission has not established what is obviously necessary to its conclusion that the terminal operators are charging twice for the same service, namely that the services are in fact the same. The petitioners, on the other hand, have established the contrary, although this was not their burden to prove. This being the case, it is logically unnecessary to consider further the conclusion that petitioners' lighterage tariff enacts a double charge. However, because of the Commission's reliance on this argument, which is entirely fallacious, we consider it briefly below.

The double charge argument:

There is, of course, no "double charge"; no one is being charged twice for the same service, no one is paying twice. What the Commission evidently has in mind is a double recovery—the terminal is paid by the steamship to stevedore the ocean vessel, and if it stevedores the cargo directly to a lighter and is paid by the lighter, it receives a windfall. The short answer to this is that given above: the stevedoring contract between the terminal and vessel specifically provides for the terminal to keep the revenue earned from stevedoring lighters. The stevedoring rate arrived at between terminal and vessel thus does *not* include the stevedoring of lighters over-the-side.

To stop here, however, would leave undisclosed the real windfall involved here. If the Commission prevails, the lightermen will have saved the costs of loading and unloading when the lighter is worked over-the-side. This cost necessarily is included in the lighterman's charge to the shipper, since he has no way of knowing in advance whether he will be put pierside or vesselside by the terminal. (We confess that if the Commission prevails on this issue, the

probability of the lighter being put alongside a vessel approaches zero, JA 118). Assuming for argument's sake that he were put alongside a vessel, his saving resulting from free handling will not be passed on to the shipper; he will merely pocket it, and hope he is directed to another vessel soon. This is the windfall, as well as an unlawful discrimination, since for no reason, the lighterman is given free service at the expense of the terminal operator.

Assuming that ultimately competitive forces result in passing all or part of these savings to the shipper of cargo handled-over-the-side (which cargo should bear the cost of handling), the order will have the effect of discriminating in favor of this cargo and against cargo passing through the port generally, since the terminals' rate for stevedoring will rise *pro tanto* if lighter revenues are lost. But this is a theoretical result only. In reality, lighters will rarely, if ever, be moored to vessels, if the Commission prevails. This will mean loss of this option, and greater crowding at pierside. And it will mean higher costs for lightermen, since the lighterage tariff is extremely low, substantially below the cost lightermen experience at pierside.¹¹ Nothing in this case warrants these results. The order should be reversed.

IV. THE COMMISSION IMPROPERLY CONCLUDED THAT PETITIONERS MUST PUBLISH TARIFF RATES FOR LOADING AND UNLOADING LIGHTERS TO AND FROM THE PIER.

As the Commission found, in nearly every case where the lighter is directed to load or unload cargo at the pier it contracts with Spencer & Co., a firm which specializes in such service, to have the cargo stevedored. The amount of the payment is negotiated between them and the lighterman pays Spencer & Co. directly. As the Commission further found: (JA 63)

"Respondents have no tariff for loading [includes unloading] to the pier, and they rarely, provide loading

¹¹ Mr. Gage, then Chairman of the Conference, testified that costs of working over the side exceed revenues [JA 156] and that it costs lightermen "almost three times as much to move cargo themselves to or from the pier as it does to pay the Lighterage Tariff rates." [JA 154].

services at the pier. Usually . . . the service is performed by Wm. Spencer & Son . . ."

The terminals provide this service, at a negotiated rate, only when Spencer is unable to do so; it is an accommodation to assist the lighter. JA 151. The Commission nevertheless concluded in its decision that petitioners must include in their Lighterage Tariff rates for stevedoring lighters at pierside:

"to the extent such services are performed respondents are required to have a published tariff to inform the potential recipients of such services of the exact charges to be expected." (JA 78).

Petitioners are thus ordered to publish public tariff rates for services which they do not hold themselves out as generally performing, but may impose the condition that the tariff will apply only to the extent such service is offered.

The order is unlawful on its face. The Federal Maritime Commission has itself held that tariffs must set forth the conditions on which the service will be rendered. Here the tariff by the terms of the order itself applies only to the extent the services are rendered; petitioners retain the right, in their absolute discretion, not to stevedore a lighter, despite the tariff. As noted, such a tariff is illegal under the Commission's own decisions. In *Alaskan Rates*, 2 U.S.M.C. 558, 581 (1941), the Commission held: "when rates are published, dependent upon conditions . . . said conditions should be published in the tariff." And in *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939)¹² it struck down a tariff provision similar to that which would be published by petitioners were the Commission's order enforced. There the tariff held out service, but it was restricted by the notation "subject to prior arrangements." The Commission held:

"All provisions of this nature are objectionable because of indefiniteness, and their susceptibility to unduly preferential agreements or understandings with

¹² These cases are discussed in the Commission's recent decision in *Overseas Freight and Terminal Corp.*, February 12, 1965, Docket No. FMC 1127.

certain shippers. The tariff should fully and clearly state the conditions under which service will be accorded." Id. at 129.

Inasmuch as the order permits petitioners to assist lighters in handling cargo at pierside if they wish, but not otherwise, the conditions that would thus govern whether and under what circumstances an individual terminal operator would make the service available in a given case is thus utterly unknown until the case arises. This plainly violates the principle that a tariff must show clearly the conditions under which the services will be available. Indeed, the tariff ordered by the Commission not only violates the case quoted by the Commission in its opinion (JA 78), *Empire State Highway Transportation Assoc., Inc. v. American Export Lines*, 5 F.M.B. 565 (1959) but even violates the very portion quoted!

Presumably the tariff desired by the Commission would require that the terminal operator would undertake to furnish service if Spencer & Co. were unable to perform it, provided also that the terminal operator could spare the men himself. Neither variable provides an objective standard for determining when the terminal will stevedore the lighter. Spencer's availability, for example, probably varies with the price the lighterman is willing to pay, since the Commission would permit Spencer to continue to operate on the basis of negotiated rates. The question in part, at least, is thus not whether Spencer can do the work, but whether it will at the price offered by the lighterman. Whether the terminal operator can spare labor is a subjective concept, which is virtually impossible to cast in objective terms. Consequently, the availability of the service will depend on whether the terminal operator wants or does not want—for whatever reasons—to perform the task.

The order is further invalid because it would create a patent and glaring discrimination. It compels the pier operator to publish a tariff for stevedoring lighters to and from the pier, when Spencer, for the same service, is allowed to charge any price it can negotiate. The Com-

mission has placed itself in a bind. If, as it claims, it has power to regulate stevedores, then it must regulate Spencer as well as the terminal operators. It is arbitrary and a clear abuse of discretion to require a tariff of one stevedore and not the other, absent any evidence of rate inequities or other justifying factors. Worse, in this case the Commission ordered the tariff of the stevedore which "rarely" performs the service, and leaves the one which "usually" performs it free to do business at secret, negotiated rates. Conversely, if it claims it cannot regulate Spencer's stevedoring activities, then it has no power over petitioners'. That petitioners are "other persons subject to the act" does not help; stevedoring contracts between petitioners and steamships would not be subject to regulation by the Commission if stevedoring generally was not. The Commission is caught either way: if it has power over stevedoring the order is rank and arbitrary discrimination; if it does not have this power, it is invalid.

Lastly, it is obvious that here, again, the Commission has failed to make basic findings and give reasons for its conclusions as required by § 8(a) of the Administrative Procedure Act. The Commission made three basic findings before announcing its conclusion that petitioners must publish a tariff. First, it found that on occasions which occur "rarely" terminal operators stevedore lighters. Second, it found that the terminal operators have no published tariff for this. And third, it found that Spencer and Co. stevedores nearly all of the lighters and does not have a published tariff either. How can one conclude from these findings that the terminal operators, but not Spencer, should therefore publish a tariff? The Commission's statement that "negotiated rates are unsatisfactory" is not a finding, since it is acknowledged to be a conclusion from a prior case, and in any event, it would hardly serve to explain why Spencer's negotiated rates, which are the only ones of any importance, fail to arouse the Commission's ire the way petitioners' do.

Why, apart from the legal arguments set out above, do the terminal operators oppose the order? The tariff rates

would be compensatory, and the terminal operators would in all likelihood profit from stevedoring lighters. The answer is not that they would not like profitable business, although such business would be proportionately slight. The difficulty is that major labor difficulties are almost certain to follow publication of the tariff. As the record shows, lighter stevedoring is traditionally done by special labor, known as "Chenango" and it is this labor which Spencer employs. Chenangos have their own local within the International Longshoremen's Association (ILA). The terminal operators' employees, however, are ordinary longshoremen belonging to other locals of the ILA. Chenango labor could not be hired by the terminal to stevedore lighters because it is not the local with whom the terminal operators have an exclusive bargaining contract. One does not need to be a labor expert to appreciate that Chenangos, whose province is stevedoring lighters, would not look kindly upon longshoremen working lighters. The Commission's order, if put into effect, virtually guarantees a strike by the Chenangos, and, since their brother locals within the ILA will honor the Chenango picket lines, a portwide strike will result.

This is not a fanciful possibility. As petitioners called to the Commission's attention in the oral argument below (JA 166), one of the terminal operators tried to use regular terminal labor to unload lighters. The Chenangos struck, and for two days in May, 1964, the Port of New York was closed down. It is this spectre of labor strife that is behind the petitioners' extreme reluctance to publish a public tariff holding out—even in the limited and illusory manner required—that the terminal operators will stevedore lighter cargo at piers. At least until the present, the Chenangos do not object to accommodation stevedoring by the operators when Spencer is unavailable, but a published tariff would be a different matter.

The Commission chose to ignore the position in which its order places petitioners, even though prior to its decision it was fully aware of the labor problems involved. In so doing it again acted in disregard of the Supreme Court's mandate (*Burlington Truck Lines v. U. S.*, 371 U.S.

156, 172 (1962)) that it must "act with a discriminatory awareness of the consequences of its action."

V. THE COMMISSION'S ORDER THAT PETITIONERS MUST PAY LIGHTERMEN FOR THEIR DETENTION CLAIMS AGAINST STEAMSHIPS IS UNLAWFUL AS IS ITS ORDER THAT PETITIONERS INCLUDE A SIMILAR CLAUSE IN THEIR TRUCK TARIFF AND ASSUME LIABILITY FOR DETENTION CLAIMS OF TRUCKERS AGAINST STEAMSHIPS.

As nearly as petitioners can ascertain from this extraordinarily confusing portion of the order, the Commission reaches two conclusions with respect to lighter detention. First, it views the terminal operator as having assumed ✓ the carriers' obligation of loading and unloading cargo, and concludes that by virtue of this, the terminal operator should also be held responsible to the lightermen for any unusual delay they experience when lighters are worked over-the-side. Petitioners are held responsible even though they are wholly without fault, and the detention of the lighter is caused entirely by the carrier. This order is accompanied by a companion order, in which the *present* lighter detention rule is required to be applied to trucks and included in the truck tariff, even though the *present* lighter detention rule is, in the same order, required to be changed.

The Commission appears to adopt its hearing counsel's position that petitioners are the "proper party to assume responsibility for detention" and that "the problem could easily be handled through the adoption of a suitable detention rule in the lighterage tariff" (JA 73). This evidently makes the terminal, by administrative fiat, the lightermen's agent for collection, at no fee, and in fact goes far beyond this because the terminal must pay the claim unconditionally whether well or ill-founded. The terminal company and the steamship company are then left to determine which of the two should ultimately bear the loss. The Commission obviously accepts hearing counsels' position in this regard:

"the lighterman cannot be expected to seek out fault—this being a matter between the carrier and its contractor the terminal." (JA 73).

The order is invalid because again there are no findings to support it. The only finding made by the Commission is that "collection has been unsatisfactory". As pointed out below, this is not supported by the record. But even assuming, *arguendo*, that it were true, it does not, standing alone, or even in conjunction with the statement that the carriers' task of loading has been taken over by the terminals, point to the conclusion reached by the Commission. Collection of detention may be unsatisfactory for a number of reasons. And what is the basis for the view that the lighterman cannot be expected to seek out fault? Presumably he will frequently be in the best position to determine why his lighter was detained. This portion of the order does not consist of findings which collectively point logically to the conclusion they are supporting; it consists instead of one conclusionary statement after another, with a conspicuous lack of basic findings. For instance, there is absolutely no warrant for the offhand conclusion, wholly unsupported and, in fact, quite obviously in error on its face, that the problem "could easily be handled" through a suitable tariff provision. This, presumably, is a conclusion or ultimate finding, but we are at a loss to determine how the Commission arrived at this view. There is no suggestion as to *how* the problem can be easily handled, beyond the hint that it is a matter between carrier and terminal.

The finding that collection has been unsatisfactory is unsupported by the record. The Commission adopted verbatim the statement of the hearing examiner, who, in turn, adopted the position of Commission hearing counsel [JA 32]. Hearing counsel, in their brief to the hearing examiner, gave but one record reference to support the assertion that lightermen experience difficulty in collecting detention charges from steamships. This reference [JA 168] is to testimony by a lighter witness that he had "run into various objections to payment of demurrage".

But this single, general statement cannot stand against the fact that the lightermen were urged, in the course of the hearings, by the Chairman of the Conference, Gage, to come forward with their detention bills against steam-

ships, and not one claim was presented.¹³ This is the "problem" about which the Commission speaks, and upon which its order is based. Failure of any lighterman to present a claim warrants the inference that no detention bills were outstanding and unpaid. *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939); *United States v. Johnson*, 288 F.2d 40, 45 (5th Cir. 1961); *NLRB v. Ohio Calcium Co.*, 133 F.2d 721, 727 (6th Cir. 1943).

The Commission, as proponent of a rule or order, has the burden of proof, Rule 10(o), *Rules of Practice, Federal Maritime Commission*, (see *supra* at 33). As stated in *Schob Mfg. Co. v. NLRB*, 297 F.2d 864 (5th Cir. 1962):¹⁴

"It is not and never has been the law that the board may recover upon failure of the respondent to make proof. The burden is on the board throughout to prove its allegations, and this burden never shifts." *Id.* at 868.

The Commission has not met this burden here. Wholly apart from the lightermen's failure to respond to Gage's invitation, one general statement is insufficient here. The testimony of one lighterman that he had difficulty collecting detention is even less persuasive than that testimony which the U. S. Court of Appeals for the Seventh Circuit struck down in *Folds v. FTC*, 187 F.2d 658 (1951). There, a doctor was the sole witness for the Commission. He testified that the product involved was not effective, without having personally tested it. The Commission produced no other witness. There was no evidence, such as is present here, strongly indicating the contrary. Nevertheless, the court held the evidence insufficient to support a finding of non-effectiveness. This Court's decision in *Texaco, Inc. v. FTC*, 118 App. D.C. 336, 336 F.2d 754 (1964), vacated and remanded (on grounds not pertinent here) 381 U.S. 739, is applicable to the lack of response to Gage's request.

¹³ Mr. Gage's request is at [JA 170]. The argument that failure to present any claims shows that none existed was made in our brief before the examiner [166] and in our reply brief as well [JA 167].

¹⁴ Quoting *NLEB v. Wintergarden Citrus Production Co.*, 260 F.2d 913 (5th Cir. 1958).

There, the Court gave weight, in determining whether Texaco had exercised economic coercion, to the fact that the Commission had not called one active Texaco dealer to testify; to this Court, this indicated that they were not being economically coerced.

As the Supreme Court said in the landmark *Universal Camera* case (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-9 (1951)): "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified . . ."

The order here is further invalid in that it is hopelessly vague and confusing, and cannot be reasonably understood, either for purposes of compliance by petitioners, or for purposes of enforcement by a court asked to grant an injunction or cite for contempt. What arrangements between carrier and steamship are envisioned is completely unclear. What claims must be paid? Does the terminal under the order simply pay any claim the lighterman chooses to make? Who determines what claims arise out of detention? It is obvious that the Commission has simply said: we think there is a detention problem. Go make a rule.

The companion order is, if anything, more confusing. The Commission determined that it was discriminatory against truckers to have Lighterage Tariff No. 2 provide that nothing therein shall preclude lighters from asserting detention claims against steamships, while Truck Tariff No. 6 was silent. So it ordered petitioners to put in the truck tariff the same type of provision, saying: "By failing to recognize the right for truckers to collect detention and by expressly recognizing such rights for lightermen, respondents' tariffs give unreasonable preference to lighter traffic . . ." (JA 77). But the Commission evidently forgot that meanwhile it had ordered the detention provision in the lighterage tariff changed. There is no evidence at all—as the Commission recognizes—to suggest that truckers have ever claimed detention from a steamship, let alone been denied, and, as a consequence, the record would obviously not support a Commission determination

that terminals guarantee truck detention claims against steamships in the same manner as the Commission appears to have required in the case of lighters. On the other hand, it makes no sense to require now that petitioners "recognize" truckers' detention rights against steamships, since the whole point of this in the first place was to equalize the treatment of trucks and lighters.

This order is unfathomable, and requires no further discussion.

VI. THE COMMISSION'S DECISION IS VOID FOR VAGUENESS; IT CANNOT BE COMPLIED WITH OR ENFORCED; AND ITS VARIOUS ORDERS AND CONCLUSIONS FAIL TO MEET THE REQUIREMENTS OF § 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT.

A reading of the Commission's report and order herein discloses that it is virtually impossible to follow, so far as its organization of subject matter, presentation of findings, and discussion of argument are concerned. But even more important is the fact that what it orders cannot be understood. Section 8(b) requires that the Commission include a statement of "the appropriate rule, order, sanction, relief or denial thereof." This necessarily presumes a clear statement of appropriate rules and orders. And this the Commission has not furnished.

In its order relating to truck detention, for instance, the Commission asked petitioners to draft a tariff provision based on fault immediately after it said fault was "virtually impossible" to determine. In its order relating to the "Three O'Clock Rule" the Commission, which elsewhere in the report (JA 81) indicated full awareness of Truck Tariff No. 7, rendered an order completely at odds with the appointment system set up in that tariff, without explanation as to whether its order applied to that tariff or to the superseded tariff No. 6. In its order relating to working lighters over-the-side, the Commission ordered elimination of the body of petitioners' lighterage tariff, which was at least clear, but then in two subsequent orders called for charges in the lighterage tariff for lighters at pierside and a detention rule. We have already indicated

the impossibility of understanding the latter, and its companion ruling relating to trucks.

Such lack of clarity necessarily renders the opinion and ultimate order of the Commission unenforceable. Section 29 of the Shipping Act, 46 U.S.C. § 828, provides:

“That in case of violation of any order of the board [Commission], other than an order for the payment of money, the board or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.”

This injunctive relief, however, can be granted only in the manner provided in the Federal Rules of Civil Procedure. And Rule 65(d) requires that every order granting an injunction “shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained . . .” It is evident that virtually no portion of the Commission’s decision could be enforced on this basis. What manner of order would a U. S. District Judge issue with respect to alleged violation of the lighterage detention rule? Or the truck detention rule? How could he determine whether petitioners had complied with the pierside lighterage tariff order, assuming he was presented with a document which said “Tariff” at the top? How could he determine whether the Three O’Clock Rule in Truck Tariff No. 7 was in violation, assuming it was unchanged?

Aside from all the other deficiencies in this opinion, its incomprehensibility alone warrants its rejection.

VII. PETITIONERS’ RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND THEIR RIGHTS TO PROCEDURAL DUE PROCESS WERE VIOLATED IN THE COURSE OF THE PROCEEDINGS BELOW AND THE COMMISSION’S ORDER IS RENDERED VOID THEREBY.

In a motion filed with this Court on August 19, 1966, petitioners requested a full evidentiary hearing and leave to adduce additional evidence to obtain, and place in the record, additional information relating to serious viola-

tions of petitioners' rights under § 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c), and to due process, which petitioners had reason to believe took place in the proceedings before the Commission (JA 102). In an order filed October 31, 1966, this Court ruled that this motion be held in abeyance pending the hearing of this case on the merits. As a consequence of this disposition, petitioners lack information necessary to develop adequately what occurred with respect to this issue. Evidence of such violations is typically unknown, or at best imperfectly known, by those outside the agency or commission involved. Accordingly, petitioners here renew their motion. Such information as is now at hand to support petitioners' claims respecting this issue is presented below.

1. The Commission, in Conducting the Proceedings Below, Failed To Comply with the Requirement of § 5(c) that Hearing Examiners May Not Be Under the Supervision or Direction of Staff Members Having Investigatory Responsibility.

Section 5(c) provides in part:

"nor shall such officer [hearing examiner] be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

The hearings in the proceedings below commenced March 9, 1964, before Hearing Examiner A. L. Jordan. On February 28, 1964, ten days before the hearings began, the Commission drastically changed its internal organization. It issued Order 1, Amendment 6 (29 F.R. 3485) adding the Office of Hearing Examiners to those offices and departments of the Commission subject to the direction of the Managing Director. This Order of February 28th reads as follows:

"The purpose of this amendment is to assign to the Managing Director the responsibility for (a) the managerial direction and coordination of the organizations and activities of the Office of the Secretary,

Office of the Hearing Examiners and the Office of the General Counsel; and (b) the direction and administration of the organization and activities of Office of International Affairs.

Accordingly, Section 3 of the basic order is hereby amended in its entirety, current Section 5.07 is renumbered to 5.06 and amended, and current Section 5.06 is renumbered to 5.069.

Section 3. Lines of Responsibility

3.01 The Managing Director shall be responsible to and report to, the Chairman, Federal Maritime Commission.

3.02 The Office of the Secretary, Office of Hearing Examiners and Office of the General Counsel shall report to the Chairman, subject to the managerial direction and coordination of the Managing Director. The Managing Director shall, with respect to the activities of such offices, (1) coordinate the development and execution of major programs, policies, plans and projects to accomplish objectives established by the Chairman and/or the Commission; (2) determine work priorities and schedule the flow of work to meet such priorities; (3) review program and activity progress and otherwise maintain surveillance to assure the accomplishment of programs and projects of major importance.

3.03 The Office of Administration, Office of Information Services, Office of International Affairs and the Bureau of Foreign Regulation, Bureau of Domestic Regulation, Bureau of Hearing Counsel, Bureau of Investigation, Bureau of Financial Analysis and the Offices of the District Managers *shall be responsible to, and report to, the Managing Director.*" (Emphasis added.)

During the period in which Hearing Examiner Jordan conducted the hearings in the proceedings below, Timothy J. May was the Commission's Managing Director. Mr. May's deposition was taken in the course of proceedings below. His statements there establish that in keeping with the formal description of his responsibilities above he engaged continuously in close supervision and direction

of investigative and prosecuting functions for the Commission.

"Q. Mr. May, do you direct and administer the Bureau of Domestic Regulation?

A. Yes.

Q. Does the head of that office report to you?

A. Yes.

Q. Do you direct and administer the Bureau of Hearing Counsel?

A. Yes.

Q. Does the head of that office report to you?

A. Yes.

Q. Do you direct and administer the Bureau of Investigation?

A. Yes.

Q. Does the head of that office report to you?

A. Yes.

Q. Does the Bureau of Domestic Regulation review informal complaints and protests against the practices, methods and operations of terminal operators and conferences of terminal operators and their tariffs?

A. Yes.

Q. Does it from time to time request the Bureau of Investigation to develop additional information and data with respect to those matters?

A. Yes.

Q. *Does it prepare recommendations in cooperation with the Bureau of Hearing Counsel for formal action and proceedings before the Commission?*

A. It prepares them for my consideration. I make the recommendations to the Commission." (JA 174).
(Emphasis added.)

That the Commission's February 28th Order was in violation of § 5(c) in the context of the Commission's organizational structure was immediately apparent. The Commission's Chief Hearing Examiner, Gus O. Basham, who directed the Office of Hearing Examiners, expressed this view in a memorandum dated April 9, 1964.

"Moreover, the Administrative Procedure Act clearly provides, in Section 5(c), for the traditional separation of prosecution and investigative powers from the judicial power, the latter being exercised by hearing examiners. It renders unlawful any adjudicative de-

cision, either by the hearing examiner or by the agency where this principle has been violated. . . . It should be noted that the Order not only places the Office of Hearing Examiners under the managerial direction and surveillance of the Managing Director, but restates his authority and control over the organizational units in the Commission respectively which investigate violations, the Bureau of Investigation; the Bureau of Foreign Regulation and the Bureau of Domestic Regulation, which initiate recommendations to institute formal proceedings to determine if violations exist—the Managing Director (or his deputy) signs such recommendations—and the unit which prosecutes such violations before the hearing examiner and the Commission, the Bureau of Hearing Counsel.

It would be a severe blow to the morale of the examiners of the Federal Maritime Commission if they were required to function under a system of administrative supervision which is in contravention of the act under which their position was created. *Query, would the Commission desire to risk the validity of its decision under such a system?*" (Emphasis added.)

The Chief Examiner followed this with a memorandum to the Chairman of the Commission dated April 24, 1964, in which he reiterated his position in even stronger terms:

"However, as stated in my memorandum of April 9, 1964, I am positive that . . . [the Chairman] cannot legally delegate powers to anyone in contravention of Section 5(c) of the Administrative Procedure Act, which provides for the absolute separation of the powers of the investigator and/or prosecutor, which are firmly embedded in the Managing Director by Order 1, Amendment 6, effective February 28, 1964, and the judicial power which is vested by Congress in the hearing examiners."

Further in this same memorandum, Mr. Basham stated:

"I honestly believe that this Order is an egregious mistake, and that it should be rescinded. There is a growing concern about its effect of commingling the investigative and prosecuting powers, with the judicial power, a situation which, in my frank opinion, will eventually do great harm to the reputation to this agency as a quasi-judicial body."

Following this and many other objections, such as the letter to Chairman Harlee of March 31, 1964 from Mr. Warner Gardner, then President of the Maritime Administrative Bar Association, a copy of which is attached to petitioners' motion for a full evidentiary hearing, the Commission amended its Order of February 28th. This amendment, which is still in effect, is dated May 7, 1964, at which time the main portion of the hearings had already ended, and appears in the Federal Register for May 13, 1964, at 6290. It provides in part:

"3.04 The Office of Hearing Examiners shall report to the Chairman, subject to the administrative direction and coordination of the Managing Director."

5.05 "... Hearing examiners are exempt from all direction, supervision or control except for administrative purposes."

As regards the hearings, held before the amendment was issued, the significance of the amendment is that it *was* issued; by amending the order, the Commission showed that it, too, was aware that the February 28th Order was improper. Further, although designed to reduce the degree of control over hearing examiners to limits permitted by § 5(c), the order as amended continues to violate § 5(c) since it continues to subject hearing examiners to substantial direction by the Managing Director, who continues to have responsibility for investigatory and prosecuting functions of the Commission. His direction of the Office of Hearing Examiners is not less because termed "administrative". Petitioners know of no objective limits to the exercise of supervisory power and control which the term "administrative" would create; it is so broad, vague and general that it offers no protection whatever, at least short of the Managing Director's telling hearing examiners outright how they should decide a case. As we read § 5(c), it prohibits direction and supervision, and does not make exceptions for various sorts of direction such as "administrative".

Petitioners are not alone in their view that the amendment does not purge the organizational order of illegality

under § 5(c). Chief Examiner Basham stated, with respect to the amendment of May 7th and the resulting amended order:

"The amendment to the order does not change the preamble which still states that the Office of Hearing Examiners is under the "managerial direction" of the Managing Director.

The amended order still gives the Managing Director administrative direction over this Office—a vague and undefined power which I think is in direct conflict with the Administrative Procedure Act."¹⁵

This continued invalidity affects all activities of the hearing examiner subsequent to its issuance; these include Examiner Jordan's initial decision, and his recent supplemental initial decision as well. In short, the mere *existence* of this power, regardless of whether it was ever exercised in this particular case, (which is next to impossible for petitioners to discover) vitiates the entire proceedings below, *Amos Treat & Co. v. SEC*, 113 App. D.C. 100, 306 F.2d 260 (1962). There this Court faced the issue of whether Commissioner Cohen could, after being appointed Commissioner, participate in an SEC decision in a case in which, as a staff member, he had also participated in the course of its development by the staff. The court held that Cohen's later participation was improper, even though it was conceded that no conscious bias was present:

"It is not enough that here no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice. What must control is the policy this court has previously applied and the principles, discernible from the cases and from the statute, that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function." *Id.* at 265.

¹⁵ Letter to Edward D. Ransom, Esq., Chairman, Committee on Maritime Transportation, American Bar Association, May 20, 1964.

2. Staff Members Who Engaged in the Investigation Participated in, and Advised the Commission with Respect to Its Decision.

Section 5(c) also provides:

"No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings."

Petitioners were advised by Thomas Lisi, Secretary of the Commission, that "Present at the meeting of May 12, 1966, at the time of the voting on the adoption of the Report and Order in Docket No. 1153 were:

Chairman John Harllee
Commissioners Barrett, Day, Hearn and Patterson
J. L. Pimper, General Counsel
E. S. Johnson) of the Office of
W. Levenstein) Foreign Regulation
W. M. Rouse, Special Assistant to Commissioner
Barrett
F. C. Hurney, Special Assistant to the Secretary
T. Lisi, Secretary."

The letter in which Mr. Lisi gave this information is attached to petitioners' motion for a full evidentiary hearing, and appears at JA 179.

On its face, presence of Pimper, Johnson and Levenstein at this meeting was improper. Johnson and Levenstein both were in the Office of Foreign Regulation. We, of course, have no way of knowing what they did there with respect to this case. But it is clear from the functions assigned to that office by the Commission that they could well have worked on this case.¹⁶ Moreover, as employees of the Commission they were under the control and direction of the Managing Director. The Managing Director at the time of the above meeting of the Commission was Mr.

¹⁶ See Commission Order No. 1, as amended, 31 F.R. 15110.

Edward Schmeltzer. Mr. Schmeltzer, when he was Director of the Bureau of Domestic Regulation, was present at the Commission meeting held October 10, 1963, when the proceedings below were instituted (shown by Secretary Lisi's letter). Mr. Schmeltzer testified on deposition in the proceedings below that he personally had engaged in the investigation of this case. (JA 175.) ✓

Mr. Schmeltzer as Managing Director also supervised another staff member who was present at the meeting at which the Commission decided this case, namely J. L. Pimper, the General Counsel. The amendment of May 7, 1964, referred to above in connection with the control of the Managing Director over hearing officers, also defined the control relationship between the Managing Director and the General Counsel:

"3.02 The Office of the Secretary and the Office of the General Counsel shall report to the Chairman, subject to the managerial direction and coordination of the Managing Director. The Managing Director shall, with respect to the activities of such offices, (1) coordinate the development and execution of major programs, policies, plans and projects to accomplish objectives established by the Chairman and/or the Commission; (2) determine work priorities and schedule the flow of work to meet such priorities; (3) review program and activity progress and otherwise maintain surveillance to assure the accomplishment of programs and projects of major importance." 29 F.R. 6290, May 13, 1964. (This section is still current; see Commission Order No. 1, as revised, (Nov. 25, 1966), 31 F.R. 15110.)

Mr. Pimper's presence at the meeting violated § 5(c) because (in addition to his own prior participation discussed below) he was a subordinate of Mr. Schmeltzer, and Schmeltzer had been deeply involved in the investigation from its very beginning. The same is true of Messrs. Johnson and Levenstein; they may—we do not know—have engaged directly in the development of these proceedings at the staff level.

But even if they did not, they, too, were subordinates of Schmeltzer. It violates § 5(c) if subordinates of someone who participated in the investigation advise the agency with respect to its decision. In *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2d Cir. 1958) (abated for failure to substitute the new postmaster on the death of the original defendant, 256 F.2d 681), the principal issue was whether § 5(c) was violated by a Post Office regulation which provided that the assistant general counsel of the fraud division could file a complaint, after which the case would be heard by a hearing examiner. Either side could appeal this decision to the general counsel, whose determination became that of the agency. The court, in an opinion by Judge Learned Hand, condemned the procedure as a violation of § 5(c). The court made it clear that it considered it unlawful to have the subordinate pass upon the case if the superior participated in the investigation. As Judge Hand said, "the subordinate would then be passing upon the success of what his superior had undertaken." (Id. at 679). While the court did not directly consider the question, it is logically implicit that this illegality extends to the situation where the subordinate advises the agency ✓ in making its decision in a case where the superior participated in the case, since the same motivation—to please the superior—would be present.

While this situation is the reverse of that actually involved in *Columbia Research*, where the superior passed upon a case in which the subordinate had been involved below, the court indicated that both would violate the prohibitions of § 5(c). The case thus renders improper activities of attorneys on the staff of the General Counsel, and others subordinate to the General Counsel such as Acting Solicitor H. B. Mutter, who engaged in bitter, drawn-out litigation with respondents in the course of the proceedings below in connection with subpoena enforcement.

Further, Mr. Pimper's presence at the meeting is a violation of § 5(c) because of his own prior participation in the case. As shown by Secretary Lisi's letter, Pimper

was present at the meeting in 1963 when the Commission instituted proceedings, at which time he was *Acting Managing Director*. Mr. Pimper supervised and was responsible for the investigation and prosecution of all cases begun or in process while he was Acting Managing Director. Commission counsel in this case minimize his prior participation. In their response to petitioners' motion for a full evidentiary hearing, they state (at 3) :

"With respect to the General Counsel, while it is true that he was Acting Managing Director at the time the Commission voted to initiate the investigation in Docket No. 1153, he held that position for little more than a month after that date and did not personally participate in the prosecution of the investigation."

But this reply is inconsistent with Secretary Lisi's letter listing Pimper as present at the 1963 meeting of the Commission at which proceedings were instituted. We disagree that his participation as Acting Managing Director at this meeting falls short of personal participation in the case, cf. *SEC v. R. A. Holman & Co.*, 116 App. D.C. 279, 323 F.2d 284 (1963). The decision to begin is obviously one of the most important steps in any administrative proceeding. If, as Judge Hand said in *Columbia Research Corp. v. Schaffer, supra*, it is unlawful for the subordinate to pass upon the success of what his superior had undertaken, it was even more unlawful for Pimper, who advised the Commission to begin investigation proceedings, to later advise the Commission as to what order it should issue. A person in such a position will be motivated to have the order contain findings of violation, so as to avoid having his earlier advice to investigate viewed, in retrospect, as poor judgment.

3. The Proceedings Below Were Vitiated by Ex Parte Communication Concerning the Case Made to the Commission by Members of the Staff.

On April 7, 1964, a memorandum was prepared by Messrs. May and Schmeltzer for the Commission, and was sent to the Commission via the Secretary. May at the time was Managing Director, and Schmeltzer was Director of

the Bureau of Domestic Regulation. No copy of this memorandum was served on counsel for members of the terminal conference, or called to counsel's attention. A copy of the memorandum is set forth at JA 169. It discusses in considerable detail the background of the case and the progress of the litigation. It also sets forth how a critical issue in the proceedings—whether terminal operators may charge lighters for over-the-side stevedoring—should be decided. On the last page of the memorandum the following statement appears:

"Generally, it is considered that stevedoring charges are assessible against the steamship company and not the owner of the goods and that such costs to the vessel are taken into consideration when establishing ocean transportation rates. Based upon these considerations, any further charge against the owner of the goods would result in a double charge for a single service."

It is outrageous that statements like this were sent to the Commission two days before the hearings ended, when the authors were well aware that the case would soon go before the Commission, without having copies of the memorandum sent to counsel of record. We challenge counsel for the Commission to show in their brief any difference between this act of Commission staff members, both of whom admitted on deposition that they participated in the investigation of the case, and the act of an interested party to a lawsuit who calls on the judge and attempts to persuade him to view an issue in the case in the party's favor. We further challenge counsel to show how this ex parte communication differs from those considered and condemned by this Court in such cases as *Sangamon Valley Television Corp. v. U. S.*, 106 App. D.C. 30, 269 F.2d 221 (1959) and *Massachusetts Bay Telecasters, Inc. v. FCC*, 104 App. D.C. 226, 261 F.2d 55 (1958). This Court said in *Sangamon Valley*, citing *Massachusetts Bay Telecasters*, at 269 F.2d 224, "Interested attempts 'to influence any member of the Commission * * * except by the recognized and public processes' go 'to the very core of the Commission's quasi-judicial powers * * *'."

Moreover, the memorandum violates the Commission's own Rules of Practice. Rule 10(dd) provides:

(dd) Disposition of communications extraneous to the record (46 CFR 502.170). (1) Documents not conforming to rules: Any pleading, document, writing or other paper submitted for filing which is rejected because it does not conform to the rules shall be returned to the sender;

(2) Ex parte communications:

(a) No person who is a party to, or an agent of a party to, or who intercedes in any proceeding before the Commission, as defined in Rule 5(a), shall make any ex parte communication regarding the merits of the proceeding to any Commission member, hearing examiner, or Commission employee participating in the decision in the proceeding;

(b) Ex parte communications include:

(i) Any written communication of any kind about a proceeding, if copies thereof are not served by the communicator upon all parties to the proceeding in accordance with Rule 8(d);

(ii) Any oral communication of any kind about a proceeding unless the communicator gives advance notice to all parties to the proceeding and unless contents of the communication are disclosed by the communicator to all parties at the time of the communication or promptly thereafter in writing;

(c) Ex parte communications shall not include any oral or written communication which relates solely to matters which the Commission or member thereof, hearing examiner, or Commission employee are authorized by law or these rules to dispose of on an ex parte basis;

(d) Any member of the Commission, presiding officer, employee of the Commission, or member of a board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a summary of the oral communication promptly to the Secretary of the Commission together with a written statement of the circumstances under which the communication was made,

if not apparent from the communication itself. The Secretary shall place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under the circumstances. Such communication shall not constitute a part of the record for decision.

This Court held in *Sangamon Valley, supra*, at 224 that "agency action that substantially and prejudicially violates the agency rules cannot stand."

The decision of this Court in *Amos Treat v. SEC*, 113 App. D.C. 100, 306 F.2d 260, 267 (1962) states:

"Enough has been said to demonstrate the basis for our conclusion that an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."

See also *Texaco, Inc. v. FTC*, 118 App. D.C. 336, 336 F.2d 754, 760 (1964).

In this case, too, enough has been said to demonstrate that the Federal Maritime Commission did not live up to its duty to conduct the proceedings below "not only with every element of fairness but with the very appearance of complete fairness." It did not treat petitioners here, respondents below, fairly. It exhibited below its disregard of the procedural protection given litigants by the Administrative Procedure Act.

Petitioners do not feel they receive fair play when hearing examiners are under the control of persons responsible for conducting investigations. Nor do they receive fair play when the Commission is advised in its final order by a man who not only had been Acting Managing Director previously, but who even had advised the Commission to institute the proceedings. It is not fair when subordinates

advise the Commission in proceedings in which their superior admits he played an active role. And it is not fair, after the case has been in litigation and the hearings are almost over, for two high officials supervising the investigation, one of whom, Schmeltzer, also advised the Commission to institute proceedings, to communicate ex parte with the Commission and give the Commission their view as to one of the main issues involved in the case. For procedural defects alone, which rise to Due Process stature, *Amos Treat & Co., supra*, this case must be reversed and remanded.

Respectfully submitted,

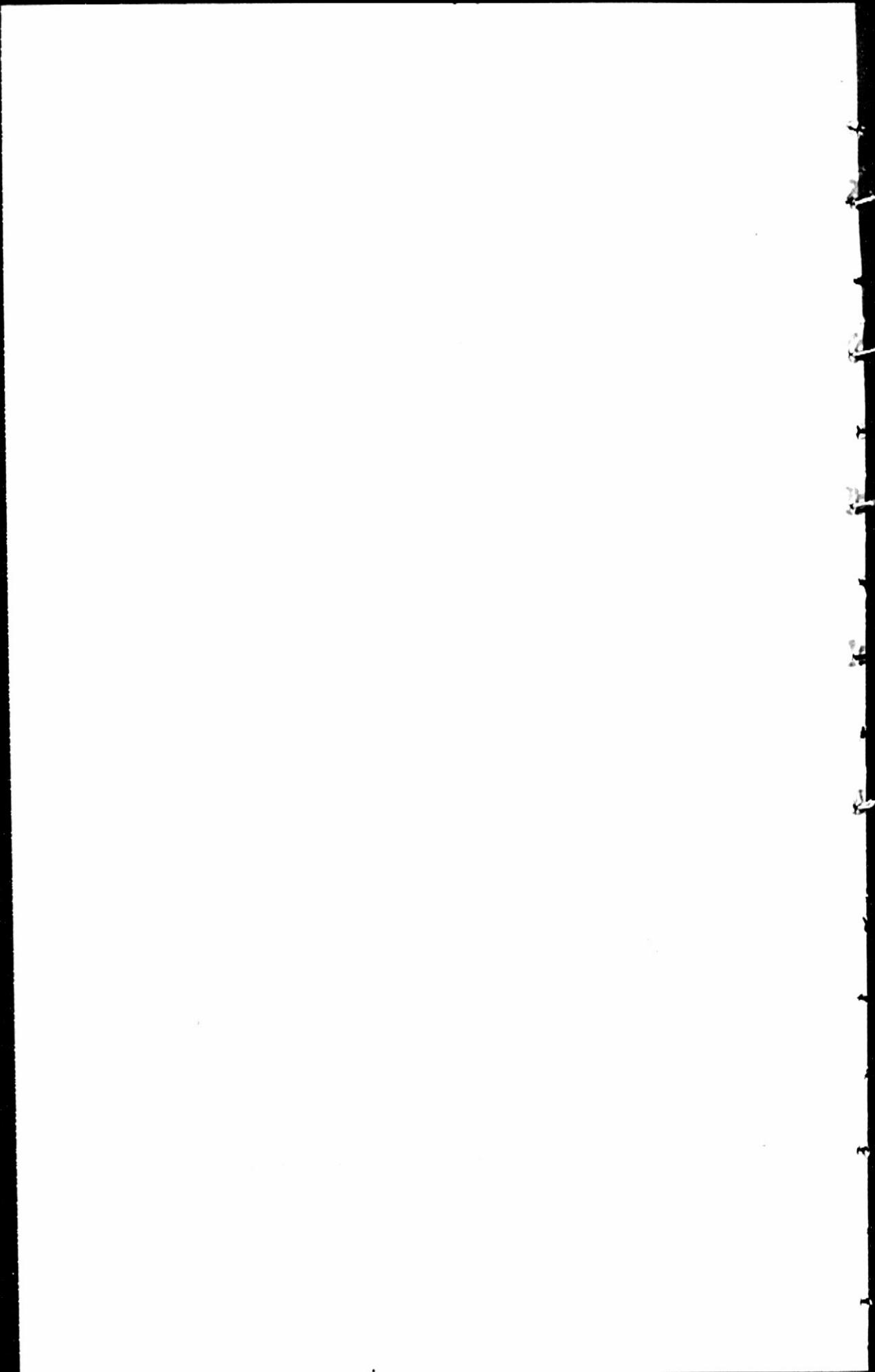
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May 29, 1967



APPENDIX**Statutes, Regulations and Rules Involved**

Shipping Act, 1916

Section 16 First, 46 U.S.C. § 815:

That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

Section 17, 46 U.S.C. § 816:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Section 29, 46 U.S.C. § 828:

That in case of violation of any order of the board, other than an order for the payment of money, the board, or any party injured by such violation, or the Attorney General, may apply to a district court, having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Administrative Procedure Act

Section 2(c), 5 U.S.C. § 1001:

(c) "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations,

costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 4(a), (b) and (c), 5 U.S.C. § 1003:

§ 1003. Rule making

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

Notice; publication and contents

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Procedures

(b) After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency

hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

Time of publication or service of rules

(c) The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

Section 5(c), 5 U.S.C. § 1004:

Authority and functions of officers and employees

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Section 7(c), 5 U.S.C. § 1006:

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be re-

ceived, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Section 8(b), 5 U.S.C. § 1007:

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion, presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Rules of Practice and Procedure,
Federal Maritime Commission

Rule 10(o), 46 CFR 502.155:

(o) Burden of proof. At any hearing in a suspension proceeding under section 3 of the Intercoastal

Shipping Act, 1933 Rule 5(g), the burden of proof to show that the suspended rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order.

Rule 10(dd), 46 CFR 502.170:

(dd) Disposition of communications extraneous to the record. (1) Documents not conforming to rules: Any pleading, document, writing or other paper submitted for filing which is rejected because it does not conform to the rules shall be returned to the sender;

(2) Ex parte communications:

(a) No person who is a party to, or an agent of a party to, or who intercedes in any proceeding before the Commission, as defined in Rule 5(a), shall make any ex parte communication regarding the merits of the proceeding to any Commission member, hearing examiner, or Commission employee participating in the decision in the proceeding;

(b) Ex parte communications include:

(i) Any written communication of any kind about a proceeding, if copies thereof are not served by the communicator upon all parties to the proceeding in accordance with Rule 8(d);

(ii) Any oral communication of any kind about a proceeding unless the communicator gives advance notice to all parties to the proceeding and unless contents of the communication are disclosed by the communicator to all parties at the time of the communication or promptly thereafter in writing;

(c) Ex parte communications shall not include any oral or written communication which relates solely to matters which the Commission or member thereof, hearing examiner, or Commission employee are authorized by law or these rules to dispose of on an ex parte basis;

(d) Any member of the Commission, presiding officer, employee of the Commission, or member of a board, participating in the decision who personally re-

ceives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a summary of the oral communication promptly to the Secretary of the Commission together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself. The Secretary shall place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under the circumstances. Such communication shall not constitute a part of the record for decision.

Order 1, Amendment 6 §§ 3.01, 3.02 and 3.03,
Federal Maritime Commission
(Issued February 28, 1964) (29 F.R. 3485) :

"The purpose of this amendment is to assign to the Managing Director the responsibility for (a) the managerial direction and coordination of the organizations and activities of the Office of the Secretary, Office of the Hearing Examiners and the Office of the General Counsel; and (b) the direction and administration of the organization and activities of Office of International Affairs.

Accordingly, Section 3 of the basic order is hereby amended in its entirety, current Section 5.07 is renumbered to 5.06 and amended, and current Section 5.06 is renumbered to 5.069.

Section 3. Lines of Responsibility

3.01 The Managing Director shall be responsible to and report to, the Chairman, Federal Maritime Commission.

3.02 The Office of the Secretary, Office of Hearing Examiners and Office of the General Counsel shall report to the Chairman, subject to the managerial direction and coordination of the Managing Director. The Managing Director shall, with respect to the activities of such offices, (1) coordinate the development and execution of major programs, policies, plans and projects to accomplish objectives established by the Chairman and/or the Commission; (2) determine work

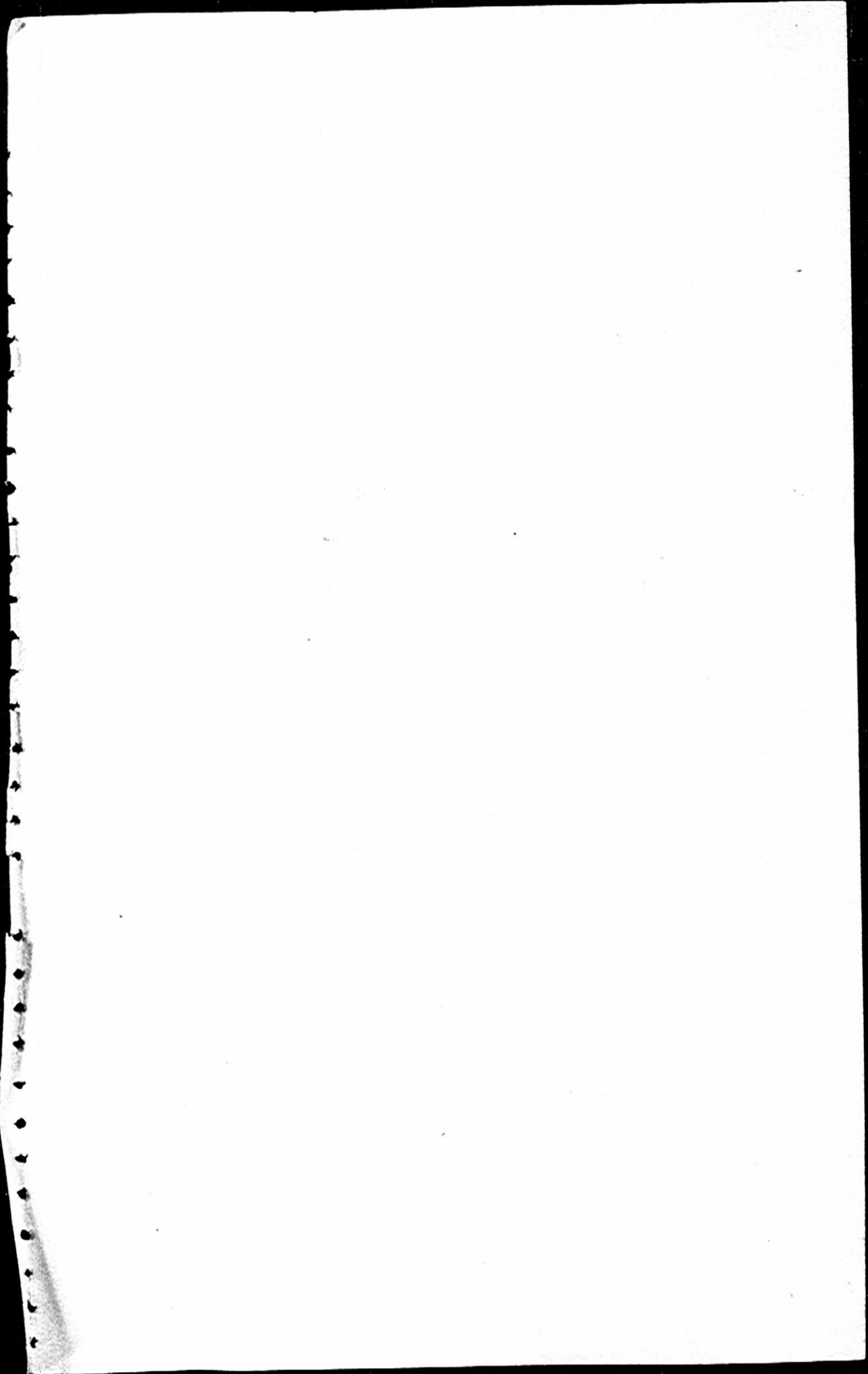
priorities and schedule the flow of work to meet such priorities; (3) review program and activity progress and otherwise maintain surveillance to assure the accomplishment of programs and projects of major importance.

3.03 The Office of Administration, Office of Information Services, Office of International Affairs and the Bureau of Foreign Regulation, Bureau of Domestic Regulation, Bureau of Hearing Counsel, Bureau of Investigation, Bureau of Financial Analysis and the Offices of the District Managers shall be responsible to, and report to, the Managing Director."

(Note: This amendment was rescinded in part by Amendment 10, issued May 7, 1964 (29 Fed. Reg. 6290)):

"3.04 The Office of Hearing Examiners shall report to the Chairman, subject to the administrative direction and coordination of the Managing Director."

5.05 "... Hearing examiners are exempt from all direction, supervision or control except for administrative purposes."



REPLY BRIEF OF PETITIONERS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA, *Respondents.*

Petition for Review of an Order of the
Federal Maritime Commission
United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 29 1967

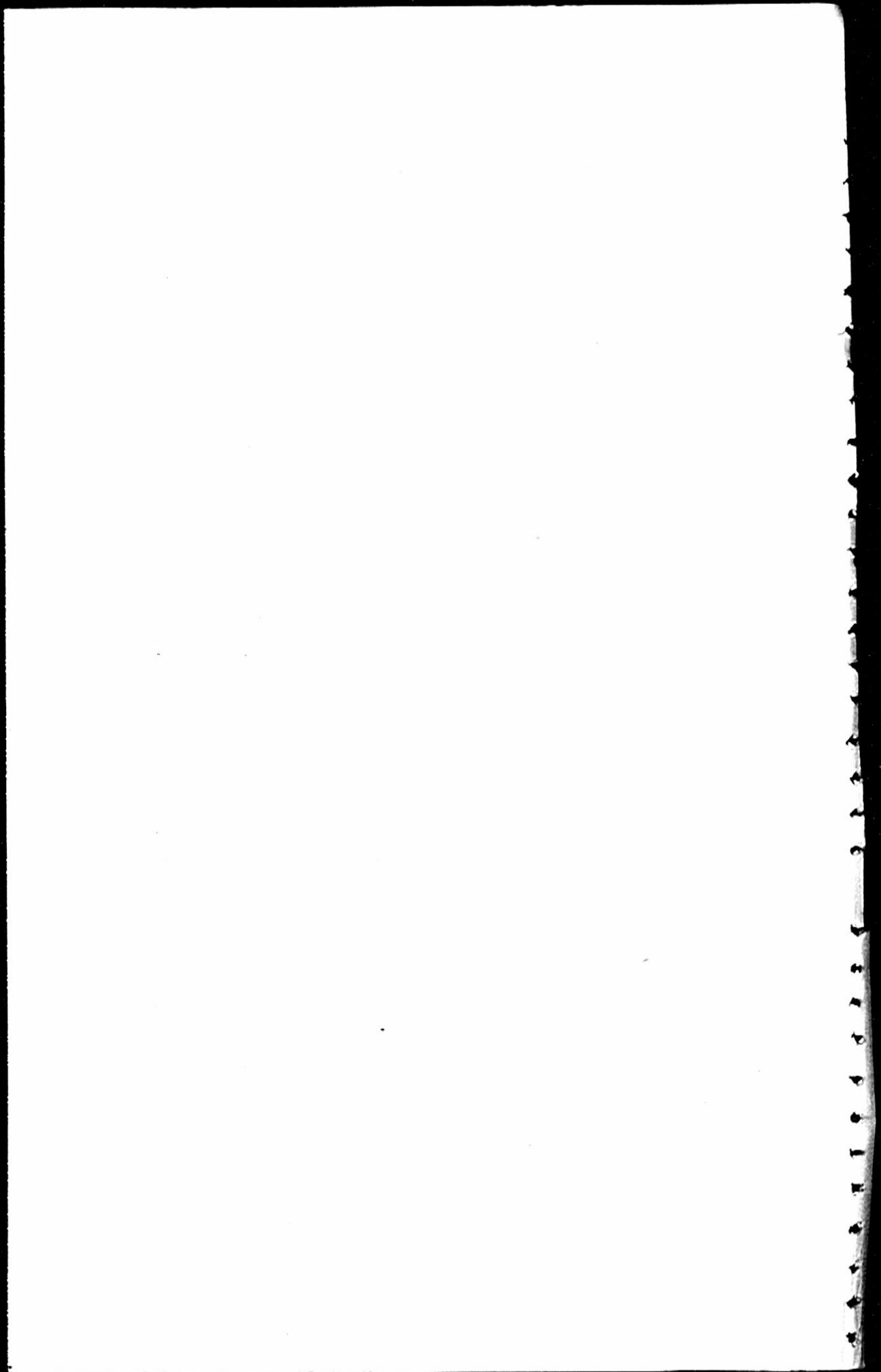
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May 29, 1967



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AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
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FEDERAL MARITIME COMMISSION AND UNITED STATES
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**Petition for Review of an Order of the
Federal Maritime Commission**

REPLY BRIEF OF PETITIONERS

The issues raised in petitioners' brief and in the answering briefs concern principally five substantive issues raised by the petition for review. These are whether the Federal Maritime Commission erred in determining that: (1) petitioners, the New York Terminal Operators, must formulate and promulgate in their truck tariff a truck detention rule under which they are liable for delays to trucks unless the delay is outside the control of the terminal operators; (2) the terminal operators must delete from their "Three O'clock Rule" the condition that the rule will

not apply in cases where trucks are unloaded without the services of the terminal operators' employees; (3) terminal operators may not publish charges in their Lighterage Tariff No. 2 for stevedoring lighters over-the-side of ocean vessels; (4) the terminal operators must publish tariffs for stevedoring lighters moored alongside the pier and, (5) the terminal operators must guarantee payment of all detention claims of lightermen. With respect to the last issue, (5), there is disagreement among the parties as to whether the Commission's order requires payment of detention claims even though the detention was not caused by the terminal operator.

In addition, there is at issue the question of whether the Commission's order as a whole is void for lack of findings and reasons and is unenforceable for vagueness. Further, in both our brief and in an earlier motion for a full evidentiary hearing, a ruling on which is being held in abeyance pending decision on the merits, we claim that the Federal Maritime Commission failed in the proceedings under review to comply with the requirements of Section 5(c) of the Administrative Procedure Act and of Due Process.

1. Whether the Terminals Were Properly Made Liable for Delays Experienced by Trucks

With respect to the first issue—truck detention—there is no disagreement that there is congestion at the piers. In *Empire State Highway Transportation Association v. American Export Lines*, 5 F.M.B. 565 (1959), the Commission found, as set forth at length in petitioners' brief at 12-13, that this congestion arises primarily from over-use of antiquated pier facilities by trucks in numbers never visualized when the facilities were first constructed. Nevertheless, and despite its findings in the proceedings under review that "it is virtually impossible to determine responsibility for truck delay because of the many and varied factors which may or do contribute toward a particular instance of delay" (JA 74), the Commission ruled

that terminal operators must bear liability for any unusual delay experienced by any truck which happens to use the piers, unless the terminal involved can show the delay was not under its control. We objected first that this ruling was inconsistent with the above finding, and referred to two recent decisions of this court rejecting determinations of the Federal Maritime Commission (or its predecessor, the Federal Maritime Board) which were inconsistent with the findings made.¹ Against petitioners' contention that the determination is inconsistent with the findings, one of the trucking intervenors, Empire State Highway Association, is silent. The other trucking intervenor, Middle Atlantic Conference, evidently reads the Commission's order as imposing virtually absolute liability on the terminals for truck delay: in the view of Middle Atlantic Conference, the terminals would be exonerated only by such factors as "strikes, weather conditions, or acts of God." Middle Atlantic Conference appears to conclude that as a consequence the allegedly inconsistent finding is not relevant, although the conference's argument in this respect is, to us, confusing: "There is nothing inconsistent . . . The Commission is not saying, as Petitioners would have it, that the cause of delay cannot be ascertained in a particular instance. The Commission is merely recognizing, as the record shows, that delays are attributable to many factors which, unlike lighter delays, cannot be isolated and attributable to any single cause." (Typewritten brief; 12). They say also that "the necessity and practicability of a detention rule need not and does not depend on the isolation of the cause of delay in a particular instance."

The Commission in its brief stated that the theory employed in the decision was that the terminal operators control the pier which, in turn, puts them in a position to pre-

¹ Aktiebolaget Svenska Amerika Linien v. FMC, 122 App. D.C. 59, 351 F.2d 756 (1965); Royal Netherlands SS Co. v. FMB, 113 App. D.C. 62, 304 F.2d 938 (1962).

vent "many delays"; accordingly, the operators should "not be permitted to abdicate their responsibility merely because the delay in a particular instance cannot clearly be attributable to the terminals' misfeasance." (Type-written brief, 11). This, too, would obviously result in subjecting the terminal operators in most situations to guaranteeing all trucks using the New York Waterfront daily that if they are delayed the piers will pay them damages, a staggering burden when the daily volume of trucks is considered. Neither the response of Middle Atlantic nor of the Commission explains the patent inconsistency between the Commission's finding and its order, which was clearly bottomed on determining fault in particular instances, since particular instances are all that would ever be involved in a suit for detention damages.

Further, it is clear that in any case there are no affirmative findings to support the order, particularly one as far reaching as the Commission now claims. As discussed at length in petitioners' brief, this alone renders the order void, see *Transpacific Freight Conference of Japan v. FMB*, 112 App. D. C. 290, 302 F.2d 875 (1962) and cases cited in petitioners' brief at 19.

The variance between the Commission's order and the interpretation of the order by the Commission and Middle Atlantic Conference in their briefs, and the variance between the order and the findings make it even more apparent that the determination regarding truck detention cannot reasonably be understood and must be set aside. Against the contention that the Commission was not concerned with causes of delay in particular instances is the fact that in its order the Commission set forth a number of acts of truckers listed by Commission hearing counsel as contributing to delay (JA 74):

"Hearing Counsel also recognize other factors causing delay, e.g., the insistence of shippers to wait until the day of sailing to deliver export cargo; the tendency of

shippers to wait until the last day of free time to pick up import cargo; presentation by shippers of improper documentations at piers; and failure of truckers to be with their trucks when they are called for service."

This acknowledgement by the Commission of its awareness that delay is not necessarily the terminals' fault must be read in conjunction with the Commission's statement that the detention rule "must acknowledge causation and exonerate the terminals for delays which it cannot control". (JA 75). These two statements taken together necessarily mean that if, in a given case, the truck involved in a claim for damages resulting from undue detention was shown to have been delayed because the driver forgot his papers, the terminal would not be liable. This emphasis on causation finds support in the Commission's own brief, in a later argument involving petitioners' appointment system. The objection is made that the appointment system would not tell the truckers what redress to expect "when culpable delays nevertheless occur." But a "culpable" delay is clearly one based on fault in individual instances. We are at a loss to see how a rule which would acknowledge such causation is consistent with the interpretation put on the Commission's order by Commission counsel that the Commission was not concerned with whether in a particular instance the cause of delay might or might not be attributable to the terminals. Furthermore, if causation is the keystone, then the finding that in a particular case it is usually not possible to isolate the cause of delay is, as a matter of simple logic, fatal to the order. In any case the confusion is evident.

A further ground for setting aside the order is that the Commission determined—with no supporting findings or reasons—that the appointment system instituted by the terminal operators as the best present solution for truck congestion is irrelevant to the issue of whether the operators should be required to bear liability for truck delays.

(JA 75). Objection to this was articulated in detail in petitioners' brief at 21-23. Neither trucking intervenor discussed this defect in the Commission's order. And the Commission in its brief merely reiterated the conclusion reached in the order that the proceedings concerned only redress for delays and not their causes.

This is no answer to our objections. Clearly the Commission's failure to make findings in support of its conclusion that the appointment system is irrelevant is unjustified, even assuming for argument's sake that redress is the only concern here. Obviously, the redress for delay that should be made to a trucker who does not make an appointment, or who fails to keep one, must be distinguished from that which should be made when a trucker appears as scheduled. The Commission's position expressed in its order and repeated in its brief that the appointment system does not affect redress is thus plainly wrong and cannot support the conclusion that appointments are irrelevant to the truck detention issue. Moreover the Commission's statement that the causes of delay are "not at issue here" is, as discussed in our brief, belied by the order of investigation and by those portions of the order which express in explicit terms the Commission's concern over truck delay and its causes. (JA 66, 74).

Nor is it an answer to suggest that the appointment system was not before the Commission in the proceedings under review. The Commission in its opinion expressly discussed the question of the impact of the appointment system on whether the terminals should be liable for truck detention. It rejected the appointment system because it determined that the system was irrelevant. The Commission in its brief made use of the appointment system to support its assertion (Typewritten brief, 11) that the terminals recognize their control over truck delays. The appointment system is not a spigot to be turned on and off when it suits the convenience of the Commission. Hav-

ing recognized the institution of the appointment system in Truck Tariff No. 7 and having dealt with the impact of this system substantively, not jurisdictionally, the Commission may not on brief urge that the issue was not before it.

A further ground urged for setting aside the Commission's truck detention order was that it exceeds the Commission's statutory power inasmuch as it does not relate to the "receiving, handling, storing, or delivering of property" as required by section 17 of the Shipping Act, 1916. The Commission's response to this argument is simply a conclusion: "What petitioners do or fail to do in coping with delays in handling cargo are plainly practices relating to the handling of property." (Typewritten brief, 12). Intervenor, Middle Atlantic Conference, dwells at length in its brief on whether the Commission exceeded its statutory power, arguing in essence that a payment to a trucker whose truck stood in line at a pier longer than usual should be regarded as being identical to a demurrage payment.

These objections misconceive the thrust of petitioners' argument. As pointed out in petitioners' brief, the Commission's truck detention rule, however interpreted, ultimately involves a payment to the trucking company and not to the cargo. The tariff rates charged by the truckers do not vary with respect to the time it takes to transport the goods. If, for example, a truck experiences unusually rapid handling there is no reduction in the price charged the shipper. Nor is there an increase in cases where a truck is caught in rush hour traffic and delayed. The Commission's truck detention rule is essentially an order calling for settlement of accounts between connecting transportation agencies and is not within section 17 of the Shipping Act, 1916. Such payments are not demurrage. Demurrage "is a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload [railroad] cars within the free time prescribed

by the applicable tariffs." *St. Louis, Southwestern Railway Co. v. Mays*, 177 F. Supp. 182, 183 (E.D. Ark. 1959). It may also, of course, refer to failure to load or unload vessels under the same circumstances and a failure to remove goods in storage. In each case the shipper or consignee has complete control over the cars, vessels, or goods and there is a prescribed time limit for him to complete the transfer of the goods involved or release of the equipment back to the carrier. The situation with respect to truck detention is completely different. There is not now, and under the circumstances cannot be, a free time provision in petitioners' tariff and the Commission has not suggested that there be one. Further the terminal has no control over a truck standing in line blocks away from the pier. Unlike the demurrage situation the terminal did not order goods to be shipped on a truck under conditions where it was clearly stated that if it retained the truck longer than a stated period of time it would make payments based on a specific schedule of charges. Here the terminal has no idea what trucks might appear on a given day, no control over what trucks appear and no way of preventing trucks from appearing except through its appointment system. Nor are the damages fixed and definite. Under the rule envisaged by the Commission, damages obviously are determined by the success of truckers in pursuing their own damage claims, which are, of course, unpredictable. The essence of demurrage is not a penalty but a contractual provision whereby a party to a contract subject to a tariff is apprised in advance of what it will cost him if he chooses to retain cars or keep goods in storage longer than the prescribed free time. It presupposes that the person asked to pay demurrage has a choice in the matter. These factors are absent here and truck detention cannot be analogized to demurrage so as to give the Commission a power it does not have under its enabling statutes.

The Commission's statement that *J. M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (1962) is inapplicable because of a difference in the issues involved also misses the point. This case represents recognition by the Commission that those practices relating to property assigned to the "special expertise of the agency" are limited. For example, the Commission pointed out in that case "claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the act." (*Ibid.*)

Petitioners further objected to the Commission's ruling regarding truck detention on the ground that it constituted an exercise of the Commission's rule-making authority and that the Commission had not followed the rule-making procedures required by the Administrative Procedure Act. The Commission answered this in its brief by asserting, first, that its ruling was adjudicatory because it was not "general and future in effect, but rather was particular and immediate." The short answer to this tautological argument is (1) that the Commission admits (Typewritten brief, 13) in the sentence immediately following that the effect of the rule is future—as it obviously is—and (2) that while to some extent the question is one of semantics, the rule is certainly not specific as opposed to general. Indeed, Middle Atlantic Conference, in its argument that rule-making is not involved, appears to say (Typewritten brief, 13) that the generality of the rule is its saving grace. It states that if the Commission had spelled out the terms and conditions of the rule, "the Petitioners' argument on the rule making violation would be well taken". The ruling is general in application because it applies to the future conduct of all terminals in New York Harbor who are members of the Conference and covers any truck which at any future time might arrive from anywhere in the United States at a pier operated by a Conference member.

The Commission's second answer is that even if the proceedings did constitute rule making, the terminal operators were afforded all the procedural safeguards required by the Administrative Procedure Act and were therefore not prejudiced. The Commission states in its brief (Type-written brief, 13) that "the Commission's order would be no less vague and uncertain if it resulted from rule making rather than adjudication". But as stated in petitioners' brief at 27, the objection that the Commission failed to follow the prescribed rule-making procedures is an objection with substance. Petitioners discovered, in the course of proceedings which had been advertised as investigatory in nature, that they would be required to adopt a rule the implications of which are enormous. There was no advance notice that such a rule would be required and no advance notice of what its proposed contents would be. Petitioners had no time to consider and present to the Commission in appropriate hearings questions regarding the burden of proof, the circumstances under which they might exonerate themselves, the forum to be used to determine detention damages and other questions of a similar nature. It is to give parties who would be affected by a proposed rule an opportunity to discuss and perhaps litigate such questions in advance of the rule's adoption that the Administrative Procedure Act contains the procedural requirements found in Section (4).

It is no answer to say, as the Commission and intervenors do, that the Commission may neatly avoid the rule-making requirements of the Administrative Procedure Act by outlining the order it desires and forcing the hapless respondent to supply operational details. The Commission may not thus avoid its responsibility by doing indirectly what it apparently does not wish to do directly.

Finally, none of the answering parties consider the charge that the Commission's order imposes millions of dollars of potential liability on terminal operators without making suitable findings and, indeed, without really

considering the matter at all. There are for example, no findings made as to the amount of money involved. There is no determination regarding the financial condition of the terminal operators (in point of fact, several operators have ceased operation since the proceedings before the Commission began). And there is no determination that the terminal operators, or shippers of goods stevedored by the terminals are the appropriate parties to bear this great economic burden. In failing to consider these questions, the Commission did not act with the discriminating awareness of the consequences of its action as required by *Burlington Truck Lines v. United States*, 371 U.S. 156, 172 (1962). On this ground also the order must be set aside.

2. Whether the Three O'Clock Rule Must Apply Regardless of Whether the Truck Driver Unloads the Truck Alone

In petitioners' Truck Tariff No. 6 (JA 161), which has since been superseded by Truck Tariff No. 7 (JA 176), item 10 provided for a "Three O'clock Rule." Under this rule, a truck in line before 3 p.m. which has been checked in with the receiving clerk is given a guarantee that it will be serviced at straight-time tariff rates regardless of the hour when servicing actually takes place. The exception is where the truck is unloaded without the services of the terminal operator. The Commission determined that this exception must be deleted. Petitioners objected to this determination because (1) the Commission's conclusion contains no supporting findings and reasons; (2) it is arbitrary in that it forces the terminals to stand by regardless of the hour while the truck driver unloads his truck at any rate agreeable to him tying up terminal labor at overtime wages for an indefinite period of time; (3) it does not consider—and indeed appears to undercut—the appointment system; and (4) it is vague and indefinite because it is impossible to determine whether the Commission meant to limit its determination to the rule as it existed in Truck Tariff No. 6 or, alternatively whether the Com-

mission's determination was meant to apply to the three o'clock rule as it appears in Tariff No. 7 as well.

In response to these objections the Commission argues (Typewritten brief, 15) that drivers have had difficulty in having their trucks unloaded after 5:00 p.m. even though they arrived before 3:00 p.m. But without regard to whether this answer is well-founded, it obviously relates only to the manner in which the rule as a whole is administered. It does *not* relate to the issue at hand, which is the narrow one of whether under the three o'clock rule the Conference tariff may limit the operation of the rule to cases where terminal operators assist in unloading the truck. The Commission did *not* decide that the three o'clock rule was invalid, but only that it should apply even where the driver unloads the truck himself. The discussion in the Commission's brief is not addressed to this determination and is hence irrelevant.

Further, none of the answering briefs satisfactorily explain the relationship between the Commission's decision concerning the three o'clock rule and the appointment system in Truck Tariff No. 7. We argued that if the Commission's determination does not apply to Truck Tariff No. 7 with its appointment system, the order in this respect is moot. If, on the other hand, the Commission meant its order to apply to Truck Tariff No. 7, then its determination is arbitrary and lacks the required findings and reasons, since no findings are made or reasons given as to why trucks *without* appointments are still entitled to receive service if they arrive before 3:00 p.m. even if the driver unloads it.

Intervenor Middle Atlantic Conference evidently has no objection to petitioners' position in this regard since its brief fails to mention the three o'clock rule. Commission counsel evidently do not consider that the later tariff was before the Commission. The answer to this

is that the Commission did not share this view when it dealt substantively with it in connection with its truck detention ruling. Empire State Trucking Association states first there was substantial evidence to support the Commission's position. But we are not advised as to what this evidence is or which of the possible positions of the Commission it supports, and in any event such an answer is not responsive to the charge that required findings and reasons are absent. Empire State then argues that the Commission's determination is not moot inasmuch as it can later consider the new tariff. But aside from the objections that can be raised to such a suggestion on grounds of administrative and judicial economy, it has no relevance to the problem here. Assuming hypothetically that this Court were to uphold this portion of the Commission's order, how would the possibility of a second proceeding serve to clarify matters now? Truck Tariff No. 6 is no longer in existence. Yet the Commission's order is absurd if applied to Tariff No. 7, wholly apart from the fact that it made no findings with respect to this tariff on this issue. It would mean that a driver who showed up before 3 o'clock in the afternoon could have his truck unloaded even if he had no appointment and insisted on unloading it himself.

In short, petitioners are in the posture of being asked to comply with a bewildering and incomprehensible order. The difficulty is of the Commission's own making. It well knew long before it wrote its decision that Tariff No. 6 had been superseded by Tariff No. 7 and it knew what Tariff No. 7 contained. The Commission, not petitioners, should bear the burden of its failure to indicate how its ruling applies to the situation existing at the time the order was issued.

3. Whether Petitioners May Include in Their Lighterage Tariff Charges to Lightermen When Terminal Personnel Load or Unload Lighters Moored Alongside the Vessels

At the outset we wish to clarify a misconception which the intervening lightermen apparently have as to what is at issue in this review proceeding and what the Commission decided. Point I of the Lightermens' brief is that terminals may not reserve the right to determine whether lighters should be directed to the side of the pier or the side of a vessel for loading or unloading cargo. We gather the lightermen wish to make this decision themselves, despite the fact that they comprise only a small part of terminal traffic. But who should direct traffic is not at issue in this case. The Commission noted in its decision that it is a universal practice for the terminal operators to direct the lightermen to a place on the pier or alongside the steamship in question. (JA 63). The Commission did *not* say this practice was illegal or otherwise undesirable. This issue was not raised in the petition for review, nor was it raised in the stipulation of issues between the parties. At no time was it raised by the lightermen. Consequently, the extensive discussion of this issue in the lightermen's brief is beside the point. It may be noted, however, that it is difficult to visualize any different arrangement since only the terminal operator is in a position to know which location is most efficient given the other work going on at the pier.

With respect to the issue of over-the-side tariff charges, the Commission and the lightermen rely principally upon the fact that no extra work is involved when the terminal operator loads to or from the deck of a lighter instead of to or from the pier. Relying upon the testimony of two lighterman who evidently observed these operations, they urge that it costs the terminal less to perform this operation than it does to load to pier side. Since, they argue, steamships pay a negotiated contract price to have their cargoes stevedored, the terminal operator thus receives a

windfall if he also may charge lightermen. As the Commission views it, he is receiving two payments for the same work.

For the reasons indicated in our brief the Commission's view is wrong. It is the Commission which is proposing its own order and it is not incumbent upon the terminal operator to prove that over-the-side loading involves extra costs. The Commission has consistently misapplied, and continues to misapply, its own Rules of Practice as well as the Administrative Procedure Act in this regard. Rule 10(o) of the Commission's Rules of Practice provides that in proceedings such as these "the burden of proof shall be on the proponent of the rule or order." Yet Commission counsel in their brief (Typewritten brief, 18) state that:

"There clearly is sufficient evidence in the record for the Commission's *rejection of petitioners' attempted justification* of the additional charges on the basis of additional expenses." (Emphasis added.)

As indicated in petitioners' brief this attitude is the same as that which the Commission displayed in its decision. Neither the Commission nor the lightermen have explained, or even discussed, in their answering briefs why, if the Commission rather than petitioners is the proponent of the order here petitioners should be required to "justify" the existence of extra costs. We again call the court's attention to the fact that in the order under review the Commission made no affirmative findings that the costs of the terminal operator are the same or lower when he loads to or from a lighter. Neither answering brief disputes that the Commission failed to make these findings. That petitioners in fact showed that extra costs are involved when they load over-the-side neither changes the burden of proof nor excuses the Commission's lack of findings. The testimony showing the reasons why extra charges are incurred in over-the-side operations—such as

the cost of re-rigging booms, and the delays caused thereby (JA 146-150)—makes clear the fact that over-the-side operations entail additional cost to the stevedore. The testimony of the two lightermen must of course be disregarded since the self interest in their testimony is obvious and, in addition, since concededly they merely observed such operations they were not in a position to be aware of the various cost factors involved.

Further, wholly apart from cost considerations, the Commission's ruling that petitioners may not charge for over-the-side stevedoring rests entirely on its assumption that there is a double charge or double recovery. Yet the stevedoring contracts between the terminal operators and the steamship companies *specifically recognize that the terminal operator will recover and retain charges for loading lighters.* This provision is in the standard form contract used with hardly any exceptions throughout the port. Paragraph 5 of these contracts states:

"Income from handling lighters and cars: the contractor shall collect and retain its customary charges for labor services in connection with the loading and unloading of railroad cars, lighters, barges and scows."

The statement by the lighterman that this refers only to the case where lighters are loaded or unloaded by terminal employees alongside piers, but not alongside vessels, is absurd. As they themselves recognize, the practice whereby the terminal operators receive charges for servicing lighters over-the-side is one of long standing, and pre-dates World War I. Alternatively, the Commission found that the occasions when terminal employees load or unload lighters alongside piers are rare, this work normally being done by Chenango labor working for William Spencer & Son. Obviously, the reference in Article 5 to "customary charges" encompasses over-the-side operations. Under this provision the steamship company and terminal op-

erator recognize that charges will be retained by the terminal, and this in turn is a factor in determining the price they negotiate for stevedoring. Accordingly, it is not true that the terminal operator is being paid by the steamship lines for loading or unloading the steamship's cargo to or from lighters.

This is further evidenced by the fact that the steamships have no complaint regarding the alleged "double" recovery, to which they would be the first to object if it actually existed. Throughout this case the Commission has never explained why the party who would be most likely to object to "double recovery"—the steamship company—has in fact not objected at all. Nor has it explained why the steamships agree in their contracts that the terminals will retain lighter revenue. The objectors are the lightermen and only the lightermen, who would use the steamship company as a device to get out of paying costs which they admit are included in their fees to shippers.

The Commission needed to establish two threshold propositions with regard to its determination that petitioners may not continue to charge—as they have for decades—for over-the-side stevedoring. First, it had to establish affirmatively that no extra costs are involved. This it has neglected to do. Second, even if it had done this, it has not been able to show, and could not possibly show because of the contractual provisions between terminal operators and steamships, that the steamships had already paid for the service. The double recovery argument is a myth, supported by no findings or evidence and the Commission's determination based thereon is plainly arbitrary.²

² In stressing the above considerations, petitioners do not mean to slight the other objection made in their brief that this ruling was beyond the Commission's statutory powers under section 17 of the Shipping Act, since it does not concern the cargo and hence does not relate to the "receiving, handling, storing, or delivering of property."

4. Whether Petitioners May Be Forced To Publish a Tariff of Charges for Loading and Unloading Lighters at Pierside

The Commission also asserts that it violates section 17 of the Shipping Act, 1916 if the terminal operator does not publish a tariff for stevedoring lighters at pierside. As set forth in the decision, the terminal operator "rarely" performs this service; when he does, it is as an accommodation to the lighterman, when Spencer cannot do it and the terminal operator has men available. (JA 63, 77-8) Several key facts bearing on this issue are clear from the decision and the briefs. First, there is no attempt by the Commission in this case to change the relationship between lightermen and Spencer & Company so as to make Spencer publish rates of the sort petitioners would be required to publish. Spencer will continue to operate using negotiated rates rather than tariff rates regardless of the outcome of this case. Second, it is obvious from the Commission's brief that no attempt will be made by the Commission to force the terminal operator to offer the service if he does not feel like doing so. The brief states (Typewritten brief, 20): "The Commission's report informs the petitioners, however, that they must publish a tariff setting forth the rates 'to the extent such services are performed.'" The Commission suggests that the terminal operators may provide as a condition "where Spencer does not have labor in a position to do it." (Ibid.) Since Spencer will always have labor if the lighterman offers a high enough price, this condition alone renders the tariff's application uncertain. And while the Commission in its brief did not expressly say so, it is evident that the terminal operator could also make the tariff conditional upon his having labor available. Thus qualified, the tariff is illegal as failing to indicate objectively the conditions upon which services will be rendered (see cases cited in petitioners' brief at 38-9).

Nowhere in its brief has the Commission addressed itself to the fact that this portion of its order creates a flagrant

discrimination. It compels the pier operator to publish a tariff when Spencer is permitted to do the same work at the same place on the basis of negotiated rates. The lighter-men in their brief say only that if Spencer is not subject to the Commission's jurisdiction he cannot be forced to publish rates and if he is subject to it the Commission "presumably" will direct that Spencer do so. This is all that the answering briefs presented on this issue since the Commission in its brief neglected to discuss this at all. The conclusion is inescapable that no satisfactory answer has been found to petitioners' charge presented at length in its brief that the Commission's order discriminates against them in favor of Spencer.

So far as the issue of labor strife is concerned if the Commission's decision prevails, the Commission suggests that this matter was not presented to it and is, in any case, largely an irrelevant factor. It is wrong on both points. The strike of the Chenangos *was* brought to the attention of the Commission in oral argument (JA 165-6) which was the first possible occasion for doing so. This strike occurred when terminal labor was used by one of the terminal operators to unload barges with the result that in May, 1964 the Port of New York was closed down for two days. The Commission as an expert body is required to take such factors into account in framing its order, *Burlington Truck Lines v. United States*, 371 U.S. 156, 172 (1962).

5. Whether the Terminal Operators May Be Forced To Assume Liability for All Lighter Detention Claims

It is clear from the briefs that there is hopeless confusion as to what the Commission decided regarding lighter detention. On its face the Commission's order appears to require the terminal operators to pay all claims lightermen may present if their lighters are delayed in loading or unloading alongside vessels, regardless of whether the terminal operator was or was not responsible for the delay. The Commission in its order said (JA 72-3) "In the case of

lighters, delay can usually be attributed to the terminal operators in that they determine in what manner and with what priority a certain lighter will be loaded or unloaded . . . [but] even if detention is caused by the carrier it is only natural to look to the terminal for redress; . . . the lighterman cannot be expected to seek out fault—this being a matter between the carrier and its contractor the terminal . . ." While this is presented in the opinion as a description of the position taken by hearing counsel there is nothing to suggest that the ruling departs from or qualifies it.

But this is not the interpretation of the opinion which the lightermen present. They view the Commission as having required terminals to pay only for detention where the terminals are responsible. As stated in their brief "simple justice requires that the terminal operators pay for the delays for which they are responsible." The lightermen do not discuss that portion of the opinion in which the Commission states that the terminal operator must bear the responsibility "for ensuring" payment of detention claims (JA 74). It is not clear from the Commission's brief (Typewritten brief, 22) what position Commission counsel is taking although it appears that they agree with the lightermen.

Petitioners frankly continue to be at a loss to understand what is being ordered. On the one hand it appears that the Commission determined that terminal operators were in the best position to receive lighter detention claims, that they must pay these and attempt, if possible, to collect from the steamships. As set forth at length in our brief, if this is indeed the Commission's position it is unsupported by findings and unsupported by evidence of record and wholly exceeds the Commission's statutory powers in compelling terminals to act as guarantor of claims with no fee or compensation therefor. If, on the contrary, the Commission merely ruled that terminal operators should be liable for detention when they cause the

undue delay then the findings and reasoning of the Commission are inapplicable to its conclusion. And, in any event, there are no findings to support even this determination as required by Section 8(b) of the Administrative Procedure Act. Further, we again call to the Court's attention the fact that the Commission's determination—whatever it might be—was based upon a finding of the hearing examiner who in turn made his finding on the basis of one reference by hearing counsel to testimony by a lighterman that he had experienced difficulty in recovering on detention claims. Such evidence fails to meet the burden of proof imposed on the Commission by Rule 10(o) of its Rules of Practice. (Appendix, petitioners' brief).

Equally confusing is the Commission's mandate that the lighter detention rule must correspond with that for trucks. In its decision, the Commission stated that it saw a distinction between the disclaimer of liability for truck detention in petitioners' truck tariff, and the lighterage tariffs' provision that it did not preclude lighters from pursuing detention claims against steamships. It claimed this discriminated against trucks even though it admitted no such claims had ever been presented. It ordered petitioners to put into the truck tariff the same type of provision, evidently forgetting that in other parts of its decision it variously ordered a truck detention rule and a lighter detention rule which are incompatible with this portion of its decision. The absurdity of the Commission's lapse—which its own counsel did not even discuss, despite a detailed discussion of it in petitioners' brief—is easily seen by comparing the three orders. First, the Commission ordered terminal operators to pay for truck detention unless they could "exonerate" themselves. Second, it ordered terminals to pay *all* lighter detention claims, whether the terminal operator is at fault or not. And third, it ordered the conference to include in its truck tariff a provision permitting truckmen to seek detention against steamships, on the ground that the detention rules should be substantially the

same. In short it ruled that truckmen must be given the same "right" to sue as lightermen had, without recalling that it had drastically changed the detention rights of lightermen. Obviously, were petitioners to include a provision similar to that which the Commission appears to require for lightermen, the resulting truck detention rule would differ from that which the Commission ordered.

This is not to suggest that the Commission could find, on the record before it, that the terminal operators must act as guarantor of all detention claims of both trucks and lighters. We are suggesting that the Commission order under review is in this, as in other respects, so carelessly formulated and internally inconsistent as to be incomprehensible, and incapable of compliance or enforcement.

6. Whether Petitioners' Rights Under the Administrative Procedure Act and to Due Process Were Violated in the Course of the Proceeding Before the Commission

In our motion for a full evidentiary hearing and in our brief we detailed instances where the terminal operators' rights under the Administrative Procedure Act, as well as their rights to procedural Due Process, were disregarded. Summarized, these instances include the following.

1. Ten days before the hearings began the Commission changed its internal organization placing hearing examiners under the managerial direction of the Managing Director. While the Commission soon realized the illegality of this arrangement, the arrangement prevailed through most of the hearings.

2. Staff members who engaged in the investigation participated in the decision. These persons include two members of the Office of Foreign Regulation, and James L. Pimper, General Counsel. Mr. Pimper's presence violated the Act in a number of respects, partly because he was Acting Managing Director and was active in instituting proceedings in the investigation. Presence of the others likewise violated the act.

3. Members of the Staff improperly communicated ex parte with the Commission.

Inasmuch as petitioners have already discussed these instances as extensively as it is possible for them to do so, in light of their somewhat limited information, we will refer to, and incorporate here the discussions appearing in petitioners' brief, in the motion for a full evidentiary hearing, and in petitioners' reply to answers to petitioners' motion for a full evidentiary hearing.

The responses on this issue have been varied. The Commission claims petitioners were not prejudiced, since they have not shown exactly how the Managing Director influenced the examiner. This showing, which one outside the agency could probably never make, is not required, *Amos Treat & Co. v. S.E.C.*, 113 App. D. C. 100, 306 F.2d 260 (1962); Law, *Disqualification of SEC Commissioners Appointed from the Staff*, 49 Corn. L. Q. 257 (1964).

This same error is evident throughout the Commission's discussion of Mr. Pimper's presence, i.e., the statement in its brief (Typewritten brief, 29) that "Pimper served as Acting Managing Director for only one month. The likelihood of his active participation in the investigation in any substantial degree was minimal in view of his short tenure." The Administrative Procedure Act does not subject petitioners to the risk of assuming that because Mr. Pimper was only managing director for one month they were not prejudiced by his presence at the meeting at which an order was adopted ruling against petitioners across-the-board.

The same is true regarding Mr. Pimper's "investigatory zeal" or its lack, as relating to his acting in both an advisory capacity to his staff, and in a subordinate capacity to the Managing Director. Nowhere does the Commission discuss the fact that Mr. Schmeltzer was present at the time proceedings were instituted in 1963. He was Managing Director when the Commission decided the case being

reviewed here. He also supervises Mr. Pimper. The subordinate thus passed on what his superior began, which violates the Act. *Columbia Research Corp. v. Schaffer*, 256 F.2d 677 (2d Cir. 1958) (abated for unconnected reason, 256 F.2d 681).

Finally, the Commission errs when it says the memorandum from Messrs. May and Schmeltzer was not relevant. A copy of this is at JA 169 and it shows that they discussed the question of whether lighters may be charged for over-the-side loading or unloading.

The Commission, and intervenor Middle Atlantic, would also avoid the effects of the Commission's failure to abide by the requirements of § 5(c) of the Administrative Procedure Act by saying that piers are a "public utility" and that the section does not apply. The Court is referred to our discussion of this issue in our *Reply to Answers to Petitioners' Motion for Full Evidentiary Hearing*, filed October 4, 1966, in these proceedings. In short, the answer to this contention is that *Davies v. Bowles*, 321 U.S. 144 (1944) and *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 370 (1945) held that with respect to unamplified statutory references to "public utility" such as are found in § 5, the question of what is a public utility is to be determined by state law. The leading New York case of *Randall v. Bailey*, 23 N.Y.S. 2d 173 (Sup. Ct. 1940), *aff'd.* 288 N.Y. 280, 43 N.E. 2d 43 (1942) makes it clear that docks in New York are *not* utilities. In this famous case, the question was whether Bush Terminal Company properly paid out some \$3.6 million in dividends. Bush Terminals owned land "equipped with piers and warehouses, and other terminal facilities." It acquired "additional piers and warehouses and other terminal facilities." In fact, the Bush Terminal Company *was* a New York harbor terminal operator. Justice Walter of the Supreme Court, whose decision was affirmed on appeal, said, discussing the good will of the Bush Terminal Company:

"The term 'good will' is generally used as indicating that element of value which inheres in the fixed and favorable consideration of customers arising from an established and well-known and well-conducted business, *and in an enterprise of this sort, enjoying no legal monopoly, and not a public utility in a legal sense,* that element of value indisputably is property for which stock may be issued . . ." (Emphasis added.)

The claim that § 5(c) does not apply because petitioners operate "public utilities" is thus without merit.

CONCLUSION

For the foregoing reasons, read in conjunction with petitioners' principal brief herein, the relief requested in the petition for review should be granted.³

Respectfully submitted,

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May 29, 1967

³ If appropriate in light of other relief which may be granted, petitioners also urge the Court to grant their motion for a full evidentiary hearing.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
THE FEDERAL MARITIME COMMISSION

DONALD F. TURNER
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United States Court of Appeals
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FILED MAY 29 1967

WALTER H. MAYO III

Washington, D.C.
February 13, 1967

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Federal Maritime Commission

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QUESTIONS PRESENTED

1. Did the Federal Maritime Commission err in finding that certain of petitioners' terminal practices violated section 17 of the Shipping Act of 1916?
2. Were the Commission's conclusions that petitioners' truck and lighterage tariffs must be amended supported in its report by adequate findings of fact and reasons?
3. Were petitioners denied the safeguards of the Administrative Procedure Act relating to the separation of investigatory and judicial functions and injured thereby?

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COUNTERSTATEMENT OF THE CASE

This case is before the court on a petition to review an order of the Federal Maritime Commission (Commission) issued and served on May 16, 1966, pursuant to the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 (1961) et seq. (Act). The order was issued in the Commission's Docket No. 1153 - Truck and Lighter Loading and Unloading Practices at New York Harbor. Jurisdiction to review the Commission's order is conferred on this court by 28 U.S.C. §2341 et seq., P.L. 89-554, September 6, 1966, which reenacted, with minor changes not here relevant, the Review Act of 1950, 5 U.S.C. 1031 et seq.

Petitioners are members of the New York Terminal Conference, an association of companies which operate terminal facilities in the Port of New York and vicinity. The Conference operates under an agreement, approved by the Commission, which permits the member companies to agree on rates and practices with respect to the services of loading, unloading and storage of waterborne freight.
^{1/}

A shipper of export cargo normally pays at least two freight charges:
^{2/}
one to a trucking or lighterage company to have the cargo transported to the terminal, unloaded and put at a place of rest; the other to a steamship company

1/ Section 15 of the Shipping Act, as amended, 46 U.S.C. §814, pursuant to which the Commission's approval was given, exempts from the antitrust laws approved agreements for ratemaking and other conduct enumerated in the section. See Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

2/ A lighterage company operates lighters which are usually non self-propelled flat-bottomed boats used to transport cargo in and around the harbor area of New York.

to have the cargo moved from the place of rest to the ship's tackle, loaded into the ship's hold, and transported to the foreign port. In the case of import cargo, the process is reversed. The process of moving the cargo from the place of rest and of loading and unloading the cargo to and from the ship is called stevedoring and is done on behalf of the steamship companies under contract by terminal operators using their own employees. Other services performed by the terminal operators include the loading and unloading of trucks and lighters, the movement of cargo on the pier, the storage and maintenance of cargo on the pier, clerking and wharfage.

The operators have filed with the Commission tariffs setting forth rates, rules, regulations and practices with respect to services performed in relation to trucks and lighters at the pier. It is certain of these rates and practices which are here in issue.

A brief description of the terminal operations will be helpful to an understanding of the issues.

Lighters. A small and diminishing volume of oceangoing freight passing through the Port of New York involves the use of lighters. In relation to oceangoing vessels, a lighter may be loaded or unloaded in two basic ways. First, it can be moored against the non-pier side of the ship which itself is moored to the pier. Cargo is then unloaded directly from the deck of the lighter to the hold of the ship, almost always using the ship's rigging. The procedure is reversed for loading the lighter. This procedure avoids one step in the process of getting cargo on or off the vessel, viz., the step of transferring

cargo to the pier before loading it onto the vessel. Second, the lighter may be moored directly alongside the pier. Then, using rigging on the lighter (if of the design which has such gear) or a crane on the pier, the cargo is placed on an adjacent point on the pier. It is subsequently moved from that point either to a resting place in a less congested storage area of the pier for later transfer to the ship or, as happens occasionally, it may be taken from the point on the pier adjacent to the lighter directly to the ship's tackle.

When lighters are worked alongside the vessel, the operation is called "over the side" loading. It is always performed by longshoremen employed by the terminal operator in its stevedoring capacity. When lighters are moored to the pier for unloading, the operation is referred to as "to the pier" or "lighter-pier". To the pier operations are almost always performed by the Wm. Spencer Stevedoring Company whose longshoremen are known as "Chenangos". Chenangos perform virtually all lighter-pier operations and are members of a separate local of the International Longshoremen's Association. There are occasions, however, when Spencer labor is unavailable. In those cases, the terminal operators will supply the labor necessary to unload to the pier.

The method by which a lighter will be worked and when it will be worked are entirely within the control of the terminal operator who has assumed the stevedoring function for the ship. Because of this control and the exigencies of ship loading and unloading, lighters are sometimes worked at night, requiring the lighterage company to pay its lighter personnel overtime wages. There is, however, no provision in the lighterage tariff of the terminal operators for compensating the lighterage company for delays at the pier.

The tariff of the terminal operator imposes a charge on the lighterage company for loading and unloading a lighter moored alongside the ship, i.e. for over the side stevedoring. The terminal operator also charges the steamship company for loading and unloading the ship. In those occasional instances when the terminal operator performs the lighter to the pier service, it does so on a negotiated rate basis and its tariff contains no provision for such service.

Trucks. At least 85 per cent of the cargo moving through New York goes by truck. The facilities for handling that cargo vary from pier to pier depending, in part, on the age of the pier and its use by carriers.

The trucker, upon arriving at the pier, checks in at the gate with a clerk employed by the terminal operator. After his papers are processed, he receives a gate pass and takes his place in line. Delay, often because of congestion, is perhaps the greatest single problem involving truck traffic on the pier.

All truck loading under the tariff is done by employees of the terminal operator. The truckman, however, has an option under the truck tariff either to unload his own truck or to have the terminal operator perform or assist in the unloading. If the truckman requests unloading assistance from the terminal operator, he pays an extra charge for the service. The unloaded cargo is then moved by hilo (forklift) from the foot of the truck either to the vessel, or in most cases, to a place of rest in a storage area on the pier for

later transfer to the vessel. All hilo operators and clerks who check cargo coming to or leaving the pier are terminal employees. On rare occasions, heavy lift cargo is lifted directly from the bed of the truck into the hold of the ship. This method is known as "direct transfer".

One provision in the terminal's tariff relating to trucks is the so-called "three o'clock rule". It assures the servicing by the terminal on the same day at straight time rates of any trucker who unloads with the services of the terminal operator.

In October 1963, the Commission ordered an investigation for the purpose, among other things, of ascertaining whether the rates, rules, regulations, and practices contained in petitioners' Lighter Tariff No. 2 and Truck Tariff No. 6 violated sections 15, 16 and 17 of the Act, 46 U.S.C. §§ 14, 15, and 16. A full hearing was conducted at which petitioners and eight intervenors, including Commission's Hearing Counsel, were permitted to introduce evidence, cross-examine, and argue orally. The transcript exceeds 2800 pages. The Hearing Examiner filed his initial decision (J.A. 2), and exceptions were taken. On May 16, 1966, the Commission issued its report. (J.A. 60). The order accompanying the Commission's report required petitioners (1) to cease and desist from engaging in certain practices found to violate section 16 First and section 17 of the Shipping Act (46 U.S.C. §§ 815, 816) and (2) to modify the provisions of their Lighterage Tariff No. 2 and Truck Tariff No. 6 in a manner consistent with the Commission report. On December 19, 1966, a Supplemental Report was issued dealing with questions concerning aspects of the investigation which had been reserved and which are unrelated to this petition for review.

SUMMARY OF ARGUMENT

I. The Commission concluded that petitioners must insert in their truck tariff a detention provision whereby truckers would be compensated for delays caused by or under the control of terminal operators. The conclusion was reached after a finding that truckers encounter substantial delays at piers operated and controlled by petitioners and that at least some of the delays are attributable to petitioners. Moreover, the order properly leaves the framing of the detention rule to petitioners since they are best suited to determine how to remedy the violation of section 17 of the Shipping Act. Finally, petitioners were accorded all the procedural safeguards guaranteed by the Administrative Procedure Act for this adjudication.

II. The Commission determined that certain aspects of petitioners "three o'clock" rule were not just and reasonable and ordered them stricken. The three o'clock rule specifies that a trucker in line at the pier by that hour will be serviced to completion by the terminal at a straight time wage rate. However, the three o'clock rule may not be invoked by the trucker if he chooses to exercise the option, otherwise granted in the tariff, of unloading his own truck. The Commission correctly concluded that since the rule's restriction on unloading tended to exert pressure on the trucker to use terminal help, the rule should be amended to extend its application to cases where the trucker unloads his own truck.

III. Under its lighterage tariff petitioners imposed an extra charge on the lighter for loading or unloading the craft directly over the side. The Commission correctly found that the additional charge was not warranted by additional costs incurred in the operation and that, in any event, no extra stevedoring charges can legally be assessed against a lighter since comprehensive stevedoring compensation was already being paid to the terminal operators under its contracts with the shipping lines.

IV. The Commission found that on some occasions, the loading and unloading of lighters to the pier was performed by petitioners, rather than by the Spencer Company, the stevedoring concern which generally performed that service. To the extent petitioners perform this service, the Commission properly concluded that they would have to insert in the lighterage tariff a provision setting forth the rates and terms of that service. The suggestions that the rate might adversely affect Spencer's position in the market and that the new tariff would precipitate a port-wide strike are purely speculative and largely irrelevant.

V. It was also properly determined that petitioners should pay detention to lighterage companies for unusual delays encountered in the ship loading process. The conclusion was based on a finding that lighters were under the absolute control of petitioners during the stevedoring operation. Moreover, the Commission's order that petitioners amend their truck tariff detention language so as to conform with the detention language in petitioners lighterage tariff was reasonable and proper since it is designed to eliminate discrimination between the rights of truckers and lightermen.

VI. In this proceeding, there was no confusion of investigative and judicial functions. Although the Examiner is under the administrative direction of the Commission's Managing Director, he retains his independence in performing his judicial function. A degree of administrative control is necessary to preserve the effectiveness of government agencies. In any event, there is no evidence that the Managing Director exerted any influence on the Examiner.

Moreover, no member of the Commission's staff charged with an active investigatory role participated in the Commission's decisional process. The allegation that the Commission considered an ex parte communication from the Managing Director in reaching its conclusion is unsupported and rests on pure speculation. Nor did petitioners avail themselves of the ample opportunity to refute anything contained in the memorandum which was in their possession long before the Commission's decision.

ARGUMENT

- I. THERE WAS A RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT PETITIONERS STRIKE FROM THEIR TARIFF THE PROVISION DISCLAIMING ALL LIABILITY FOR DELAY TO TRUCKERS AND INSERT A RULE PROVIDING FOR COMPENSATION FOR UNUSUAL DELAYS WHICH ARE WITHIN THEIR CONTROL.

The Commission found that "delay is perhaps the greatest single problem involving truck traffic" on the piers; that "these delays are a serious problem to the motor carriers because the inefficient use of equipment and labor tends to increase operating costs, thus affecting their ability to compete with other modes of transportation," and that "they are a problem to shippers and receivers because the increased costs are necessarily passed on to them in the form of higher rates." (J.A. 66).

petitioners to assume liability in those instances where they cause the delay. The error in petitioners' contention is their premise that the Commission rested its ruling on the narrow ground that petitioners should be held accountable only where they cause delay by some affirmative act. But the Commission's ground was much broader. Its theory was that the terminals' control of the pier put them in a position to prevent many delays and that they should not be permitted to abdicate their responsibility merely because the delay in a particular instance cannot clearly be attributable to the terminals' misfeasance. Indeed, petitioners themselves recognize that because of their control of the terminals, they are in a position to prevent delays - they have proposed the use of an appointment system whereby a trucker may arrange with the terminal operator for a pickup or delivery time on the pier.

Nor was the Commission arbitrary, as petitioners contend in holding that the petitioners' proposed appointment system would not obviate the need for the rule. While the proposed appointment system might reduce delay - a desirable objective in the Commission's view - it would not tell truckers what redress they may reasonably expect when culpable delays nevertheless occur. The Commission, therefore, insisted on a truck detention rule which deals with the problem of what the rights of the respective parties are "if the system proves unworkable or when it breaks down." (J.A. 75).

Petitioners' argument on the vagueness and ambiguity of the detention order is also without merit. The Commission's order was as clear as the circumstances permitted. Petitioners are most familiar with the conditions on the pier. The Commission, therefore, understandably ordered them to work out a

reasonable rule which will compensate the truckers for unusual truck delays caused by or under the control of petitioners. That the Commission may compel parties to design their own method of overcoming abuses is clear. See California v. United States, 320 U.S. 577, 582 (1944). In Imposition of Surcharge on Cargo to Manila, Republic of the Philippines, 8 F.M.C. 395 (1965), for example, carriers were simply ordered to "cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments."

There also is no substance to petitioners' contention that the Commission exceeded its powers under section 17 in ordering them to strike from their tariff the provision disclaiming all liability for delays and to insert a rule providing compensation for culpable delays. What petitioners do or fail to do in coping with delays in handling cargo are plainly practices relating to the handling of property. The provision ordered to be inserted in the tariff is simply a means deemed necessary and appropriate to correct practices found to be unreasonable.

Petitioners' reliance on J. M. Altieri v. The Puerto Rico Ports Authority, 7 F.M.C. 416 (1962) is misplaced. In that case, the Commission held that a failure by a terminal operator to refund an over-payment for demurrage was not within the scope of section 17.

Finally, there is no foundation to petitioners' argument that the Commission's action constituted rulemaking and that he therefore had been denied procedural rights guaranteed by the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. By the terms of the Order of Investigation, the Commission

instituted an adjudicatory proceeding designed, inter alia, not only to investigate but also to determine whether or not petitioners' rates, rules, regulations or practices as contained in its truck tariff were violative of the Shipping Act. That the proceeding was adjudicatory in nature is evident not only from the form of the order but also from its application to petitioners:

It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rulemaking action, general and future in effect. Philadelphia Co. v. Securities and Exchange Commission, 84 U.S. App. D.C. 73, 175 F.2d 808 (D.C. Cir. 1949).

The detention rule was directed specifically at petitioners and while its effect was future, it was based on a finding that section 17 had been violated.

Petitioners were afforded all the procedural safeguards required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. and the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.1 et seq. No claim is asserted to the contrary. It is, therefore, difficult to understand the thrust of petitioners' argument that the Commission failed to comply with the rule-making safeguards of the Administrative Procedure Act. The notice of investigation advised petitioners of the nature and purpose of the proceedings. The hearing and argument permitted them to participate in the fullest sense by introducing evidence and cross-examination. Further, the Commission's order would be no less vague and uncertain if it resulted from rulemaking rather than adjudication. In either case the framing of a detention rule should have been left to petitioners who are in the best position, because of their control,

to eliminate their violative conduct. No protection afforded for rulemaking was lacking and, indeed, petitioners were afforded the considerably greater procedural rights of an adjudicatory proceeding.

II. THE COMMISSION'S RULING THAT PETITIONERS' THREE O'CLOCK RULE MUST APPLY WHEN A TRUCKER UNLOADS HIS OWN TRUCK IS PROPER AND SUPPORTED BY THE RECORD.

The so-called three o'clock rule appears as Item 10 of the conference's Truck Tariff No. 6 (J.A. 163) and provides:

A truck in line to receive or discharge cargo by 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This rule shall not apply to trucks unloaded without the services of the terminal operator.

The Commission agreed with the Examiner's conclusion that the rule was unreasonable and "should be amended to extend application thereof to cases where trucker unloads his own truck." (J.A. 80). The reason for this conclusion was that truckers are otherwise permitted by the tariff to perform their own unloading. Ibid. In addition, the Commission found that the rule can be used to compel the trucker to use the unloading services provided by the terminal operator for a fee. (J.A. 80). The basis for the Commission decision is thus clearly set forth and no more detailed findings are necessary.

The effect of the three o'clock rule is well summarized in the record by Mr. Adelizzi, managing director of the Empire State Highway Association, an

intervenor in this case. He testified that "if we are not using his [the terminal operator's] services, then he is not interested in the operation."

(J.A. 136). He testified further that notwithstanding that it was not unusual for him to arrive at the pier at one o'clock, he was often unable to unload his cargo by the end of the day because he could not obtain from the terminal a checker and hilo operator.

In arguing that the Commission's treatment of the three o'clock rule is arbitrary, petitioners are merely restating the position they advanced at the hearing. The Commission obviously chose to see the effect of the rule differently from petitioners and its choice is supported by substantial evidence examined with its expert eye. See Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (D.C. Cir. 1966).

5/ His testimony was in part as follows:

A.* * * At 1:00 o'clock I present myself at a pier to make the delivery. Now for reasons beyond my control, I can't get service and there is no service -

Q. What service do you need at this point?

A. I need a checker. I need a place to put the freight. Both of which, I have no control over. I have no control over checkers. The terminal operator assigns me a checker and he assigns me a place to put the cargo, and in my case he has got to assign me a hilo operator because much of this freight is interchanged at the head of the pier with what we call the farm, so that I wait there. I hang around there and comes 5:00 o'clock--or let me give you a more frequent experience--comes 4:00 o'clock they start to service me, and they take off a third of the load, and comes 5:00 o'clock and they say, "Well, Johnny, come back tomorrow." What is this?

Q. Do they actually shut you down at 5:00 o'clock?

A. Yes, absolutely. And we've got some letters right to that effect. (J.A. 137).

Petitioners did not except to the examiner's finding, with which the Commission agreed, that the three o'clock rule in Tariff No. 6 was unreasonable. Instead, they proposed to delete this rule upon putting into effect a new three o'clock rule contained in their new Tariff No. 7. This new rule, they believe, will eliminate the Commission's objections. The Commission, however, did not pass on the validity of the three o'clock rule in Tariff No. 7 since this was not within the scope of its investigation. It merely ruled that the three o'clock rule in Tariff No. 6 is unreasonable because it renders meaningless the option formally available to a trucker to do his own unloading and ordered that that tariff be amended accordingly. To the extent that the proscribed practice still exists, it would continue to be a violation of section 17.^{6/}

III. THE COMMISSION DID NOT ERR IN ITS DETERMINATION THAT PETITIONERS' LIGHTERAGE TARIFF MAY NOT PROVIDE FOR CHARGES TO LIGHTERMEN BY TERMINAL OPERATORS FOR LOADING AND UNLOADING OF LIGHTERS MOORED ALONGSIDE THE VESSEL.

One method of working lighters is directly to and from the ocean carrier. (See Counterstatement, supra, at 2). Stevedoring, the actual loading and unloading, is performed by longshoremen who are hired either directly by the

6/ It is, of course, true, as petitioners note, that the Commission did consider Tariff No. 7. (J.A. 81). The new tariff, however, was considered solely in connection with the question of whether petitioners had adopted procedures for dealing with shippers' requests and complaints, as required by section 15 of the Act. At the time of the examiner's decision, they had adopted none and the Commission took notice of Tariff No. 7 solely to note that petitioners did adopt such procedures. No evidentiary hearing, however, was necessary for this purpose.

carrier or by the terminal operator which is under contract with the carrier. In the latter case, the terminal operator assumes responsibility for the stevedoring function and charges the carrier for this service. The issue before the Commission was whether the terminal operator may also charge the lighterage companies for the stevedoring services performed.

The Commission found that the charge levied against the lighterage companies was tantamount to a double charge since the stevedoring service charges had already been included in the contract price with the ocean carrier. Steve-
doring is performed for and paid by the steamship company. Since the terminal

7/

- 7/ In New York by custom, the stevedoring loading service commences at some place of rest on the pier and ends in the ship's hold and the stevedore is compensated on that basis. (J.A. 70, 122-23) The converse is true in unloading the ship. When lighters are being worked, the deck of the lighter becomes the point of rest which determines the stevedoring service. (J.A. 70). As the Commission noted "in the absence of a special handling charge, the freight rate will include the stevedoring charge," citing Sun-Maid Raisin Growers Ass'n v. United States, 33 F. Supp. 959 (N.D. Cal. 1940), affirmed, 312 U.S. 667 (1940). Although the practice may differ in other ports, in New York a carrier includes handling in the service covered by its regular port-to-port rates, rather than imposing a separate, additional charge for handling. Grossman, Ocean Freight Rates, 38 (1956). In other words, the freight rate a shipper may expect to pay is not dependent on variable or unusual costs encountered by the stevedore in performing his duties. Those problems are for the carrier and his stevedore (or terminal operator) to resolve, and whether or not additional costs encountered in certain stevedoring operations are eventually reflected in higher freight rates is of no immediate concern to the shipper.

operators' costs of direct transfer are paid for by the ship, an additional charge under the Lighterage Tariff results in the terminal operators collecting twice for the performance of a single service. (J.A. 71). ^{8/}

Contrary to petitioners' contention, there clearly is sufficient evidence in the record for the Commission's rejection of petitioners' attempted justification of the additional charges on the basis of additional expenses. Richard Gage, the chairman of their Conference, admitted that there had never been a study of lighter loading and unloading costs. (J.A. 71, 126). Daniel Hession, vice-president of intervenor Henry Gillen Sons Lighterage, Inc. testified that the over-the-side operation is more efficient than lighter-pier operations because it involves work under ideal conditions - there being no pier congestion or other forms of obstruction; nor does it require the moving of cargo around the pier. (J.A. 134-35). ^{9/} Vincent Campion, operations manager for intervenor McAllister Lighterage Line, Inc, expressed the view that additional

8/ Petitioners' tariff also contained a provision which imposed a charge on truckers for the unloading by direct transfer from the truck to the vessel. The examiner concluded that direct transfer unloading of the truck, like over-the-side unloading of the lighter, was a function paid for by the vessel and ordered the elimination of the charge to the trucker. Petitioners did not except to this finding. (J.A. 72).

9/ Hession's testimony was in part as follows:

Q What has been your observation with respect to the time and work spent by a stevedore in handling cargo over-the-side compared with to the dock?

A I would say the operation over-the-side would be a more efficient operation in that the area where the men are going to work is prepared for them. There is no congestion, obstruction. They work under ideal conditions.

Working inshore through the piers there are a number of operations going on simultaneously and they contend with pier congestion, while they are unloading a ship.

Perhaps they have to ride the cargo maybe 400 or 500 feet out to the apron of the pier; maybe into an adjacent pier. (J.A. 134).

costs involved in over-the-side loading could not be established. (J.A. 132-34).

Both Campion and Hession testified that the lighterage companies had protested the charges levied against them in the case of over-the-side loading but paid them because of the terminal operators' threats that the cargo loading and unloading would be to the pier rather than over-the-side if the additional charges were not paid. (J.A. 132, 134, 135-36). ^{10/}

IV. THE COMMISSION'S DETERMINATION THAT PETITIONERS MUST INCLUDE IN THEIR TARIFF A RATE FOR LOADING AND UNLOADING CARGO TO THE PIERS IS PROPER UNDER THE SHIPPING ACT.

When a lighter is to be worked to the pier, the service is usually performed by Spencer, which is not a terminal operator, but a stevedoring company specializing in handling lighter freight. (See Counterstatement, supra, at 3).

10/ Hession testified as follows:

As far as I can recall in my 18 years in the business with Gillen, I continue that we have always felt that the stevedoring charges that were assessed to us were unfair and we always paid them under protest; always under a threat that if we didn't pay them the material would go on the dock.

That was the only reason why we paid them: in the interest of our customers to get dispatched at the piers. (J.A. 136).

Campion testified as follows:

Our objection was that the charge, first of all, should not have been levied against us at all. We have always felt that there was a definite advantage to a steamship company or a stevedore in loading our particular commodity. Let me stay with the commodity I am most familiar with. It has always been to their advantage to load it offshore over to the pier, and yet this charge was assessed.

When we tried to get relief from this, we had the constant threat that all of our cargoes would be put to the pier if we did not consent to these rates. (J.A. 132)

The vast bulk of the lighter-pier work is done by Spencer on a negotiated rate basis and not under a tariff.

Petitioners, however, occasionally perform the lighter-pier operation. The Commission held that to the extent such services are performed petitioners must publish a tariff to inform the potential recipients of such services of the exact charges to be expected. (J.A. 78).

The basis for this conclusion is clearly stated in the report. The Commission found that petitioners performed the lighter-pier service on some occasions, and did not have a tariff of rates but rather negotiated the rates on an individual basis. The Commission, relying on Empire State Highway Transp. Ass'n v. American Export Lines, 5 F.M.B. 565, 590 (1959), concluded that negotiated rates were unsatisfactory because, unlike a reasonably clear and precise tariff, negotiated rates will not be uniform to all users similarly situated, nor advise users of the conditions under which the rates apply.

Petitioners object that any tariff of lighter-pier rates would be impossible to frame because the conditions for its application could not be included therein. The Commission's report informs the petitioners, however, that they must publish a tariff setting forth the rates "to the extent such services are performed." (J.A.).

The report and record indicate that these services are performed only occasionally by the terminal operators. The compliance with its report and order that the Commission contemplates is that the terminal operators state in their lighterage tariffs the rates at which they will perform the lighter-pier loading and unloading and the conditions under which they will so perform. The terminal operators may phrase their tariffs so as to provide for the single condition "where Spencer does not have labor in position to do it." Ibid.

The contention that Spencer might suddenly become unavailable if petitioners' service charge were set too low is speculative. Petitioners admit that the tariff rate would be compensatory and in all likelihood profitable to petitioners. There is no suggestion or evidence that the negotiated contracts between petitioners and the lighters are not now compensatory, and nevertheless, there has been no discernible trend away from the use of Spencer for such operations. There is no reason for expecting a change in Spencer's share of the general pier operations under the ordered tariff. Moreover, there is no requirement in the Commission's order that petitioners tariff must be competitive with Spencer's rates. Furthermore, the possibility that the ordered tariff rate might be competitive with Spencer's negotiated rates can hardly be pursued as a ground for avoiding the tariff requirement.

As the Supreme Court recognized, having found a violation of section 17, the Commission can issue an order "generally prohibiting further preferential and unreasonable practices, leaving the parties to translate such a generality into concreteness and to devise their own remedies." California v. United States, supra, at 582.

Petitioners also contend that adherence to the order guarantees a strike by Spencer's stevedores, the Chenangos,^{11/} and, since their brother unions will honor the Chenango picket line, a portwide strike will result. Again, this argument is purely speculative. Moreover, the "labor" argument was not presented to the

11/ Chenangos are laborers who traditionally work the lighters to the piers.

Commission by way of exception to the Examiner's decision. This, of course, explains the Commission's failure to discuss the contention. Finally, the Commission is charged with administering the Shipping Act. Having found a violation, the Commission is duty bound to remedy it, within the framework of the Act. California v. United States, supra, at 582, 584.

V. THE COMMISSION WAS CORRECT IN CONCLUDING PETITIONERS MUST ADOPT A JUST AND REASONABLE LIGHTER DETENTION RULE AND THAT PETITIONERS' TRUCK DETENTION RULE GRANTED AN UNREASONABLE PREFERENCE TO LIGHTERMEN.

The Commission found that the failure to include a just and reasonable lighter detention rule in their tariff was a violation of section 17 of the Shipping Act. The Commission stated that the record indicates many instances of lighter detention. These delays can usually be attributed to the terminal operators, for "they determine in what manner and with what priority a certain lighter will be loaded or unloaded." (J.A. 72). Delays in loading or unloading result in added costs to the lighterage companies, as the equipment and men must stand by idly until the lighter is ready to be worked. (J.A. 73).

Since the reasons for the delays are clearly within the control of the terminal operator, the Commission reasoned that it is only proper that the lighterage companies be compensated for extraordinary costs resulting from unusual delay. The terminal operator assumes the ocean carriers' traditional obligation of loading and unloading. Of necessity this "carries with it the responsibility for ensuring that just and reasonable rules govern the performance of the obligation." (J.A. 73-74). Thus, where the responsibility for the stevedoring function is assumed by the terminal operator, the Commission reasoned that the terminal operator should not escape liability for the delays it causes.

Petitioners misconceive the rationale of the Commission's decision when they assert that it rested on the Commission's brief reference to the fact that the record shows that lightermen have detention agreements with some steamship companies and that their collection experience has been unsatisfactory. The Commission's theory was clear: ". . . the lighterman experiences detention of his craft for reasons residing entirely within the stevedoring process . . ." (J.A. 73).

The Commission further found that the terminal operators' tariff provisions on the issue of detention claims gave unreasonable preference to lighter traffic over truck traffic in violation of section 16 First of the Shipping Act.

(J.A. 76). In Truck Tariff No. 6 the terminal operators disclaimed all responsibility for delay to motor vehicles and stated that no claim for delay would be honored. In Lighterage Tariff No. 2, the terminal operators merely stated that nothing in the tariff would affect the lighterage company's rights, whatever they may be, to collect detention charges from the steamship companies.

(J.A. 159). The Commission based its determination of the preference to lighters over truckers, not on any actual payments made but rather on the varying provisions in the two tariffs. The Commission found that by expressly declaring that no trucker claim for delay would be honored while expressly being neutral regarding the rights of lightermen, the terminal operators were affording a preference to lightermen.

The Commission simply sought to afford the trucker the same protection in the truck tariff as lightermen received. Looking at his tariff, the lighterman was affirmatively told that the terminal operator would not stand between him

and the steamship company. Looking at his tariff the trucker was given no such assurance. The only detention language confronting the trucker was an absolute disclaimer of liability for detention. The fact that truckers had never pursued a claim against the carrier is not material. The Commission's order is that he be assured of his right to do so if he so chooses. The Commission stated that "it is conceivable that truckers would also have detention claims against the steamship company . . .". (Emphasis supplied).

The report points out that such a claim might arise, for example, "in the case of direct transfer when the terminal operator is acting as agent for the steamship company." In direct transfer, cargo is loaded directly from the truck into the hold of the vessel. In those cases, the terminal operator performs only a stevedoring function unlike his role when cargo is transferred first to the pier, then to a "place of rest" on the pier and sometime later to the ship. The terminal operator is at least arguably acting as an agent for the ship in direct transfers. Since stevedoring is the ultimate responsibility of the carrier, it is conceivable that the truckman would enter a detention claim against the ship for a delay caused by the terminal operator. Nevertheless, whether such a claim is tenable is not relevant to the truckers' right to be equally as well advised of his right to seek detention from the shipping company as is his lighterman counterpart.

In sum, the Commission order here simply sought equality of treatment. It did not require the very language of the lighter tariff to be adopted in the truck tariff. It simply demanded that the truckers receive the same rights accorded the lightermen.

VI. NONE OF PETITIONERS' STATUTORY OR CONSTITUTIONAL RIGHTS WERE VIOLATED IN THE PROCEEDING BELOW.

A. There Was No Violation of Section 5 of the Administrative Procedure Act.

Section 5 of the Administrative Procedure Act proscribes supervisory control of those performing the judicial function by those performing the investigative or prosecutive functions of an agency.^{12/}

The position of the Hearing Examiner in the Commission structure was defined in Commission Order 1, Amendment 6, published February 28, 1964, at 29 F.R. 3485.

12/ Section 5 of the Administrative Procedure Act, 5 U.S.C. §554 now states:

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

...
An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency.

The relevant portions stated:

The purpose of this amendment is to assign to the Managing Director the responsibility for (a) the managerial direction and coordination of the organizations and activities of the Office of the Secretary, Office of the Hearing Examiners and the Office of the General Counsel . . .

SEC. 3. Lines of responsibility.

3.01 The Managing Director shall be responsible to and report to, the Chairman, Federal Maritime Commission.

3.02 The Office of the Secretary, Office of Hearing Examiners and Office of the General Counsel shall report to the Chairman, subject to the managerial direction and coordination of the Managing Director. The Managing Director shall, with respect to the activities of such offices, (1) coordinate the development and execution of major programs, policies, plans and projects to accomplish objectives established by the Chairman and/or the Commission; (2) determine work priorities and schedule the flow of work to meet such priorities; (3) review program and activity progress and otherwise maintain surveillance to assure the accomplishment of programs and projects of major importance.

Confusion as to the meaning of "managerial direction" prompted further amendments to Commission Order 1, dated May 7, 1964, and published at 29 F.R. 6290. The two amendments provide:

3.04 The Office of Hearing Examiners shall report to the Chairman, subject to the administrative direction and coordination of the Managing Director.¹³

5.05 The Office of Hearing Examiners holds hearings and renders decisions therein in formal rulemaking and adjudicatory proceedings as provided in the Shipping Act, 1916, as amended and other applicable laws, in accordance with the Administrative Procedure Act and the Commission's Rules of Practice and Procedure. Hearing Examiners are exempt from all direction, supervision or control except for administrative purposes. (Emphasis added.)

^{13/} Section 3.04 was republished verbatim in the currently effective Commission Order 1 (Revised), November 21, 1966.

The amendments were not necessary to the validity of Order 1, but simply served to assure opponents of the Order that the Hearing Examiner's "judicial" independence had been preserved. Indeed §5.05 reaffirms that Hearing Examiners will function in accordance with the Shipping Act and the Administrative Procedure Act which require procedural fairness and independence of the hearing officer in reaching his decision. Moreover, by making the Hearing Examiner subject only to the "administrative direction and coordination of the Managing Director," the Commission further recognized their independence in pursuing their adjudicatory duties. Section 5.06 emphasizes that Hearing Examiners are exempt from all supervision or control except solely for administrative purposes.

What is meant by "administrative direction" should be clear. The Commission, like all government agencies subject to the APA adheres to a policy of internal separation of powers. Total separation of all of the hearing examiners' functions has not, however, been required. In the interest of effective administration, the examiners' office, as an integral part of the Commission, can reasonably be expected to adhere to Commission direction on such matters as office assignments, personnel administration, coordination of work with the rest of the agency, etc. To preclude the coordinating activities of an agency head or managing director by a requirement of total separation of all activities would seriously jeopardize the effectiveness of the administrative agency.

Furthermore, petitioners have failed to produce the least evidence to suggest that they were prejudiced by the alleged influence of the Managing Director upon the Hearing Examiner. They merely argue that the Commission Order 1 is a per se violation of the APA. It is neither argued that the Managing Director influenced the Examiner nor explained just how he could have done so under Order 1.

There is still another reason why petitioners cannot invoke the APA. The asserted statutory basis for petitioners' position, 5 U.S.C. §554, states that the subsection relating to separation of functions does not apply "(B) to proceedings involving the validity of or application of rates, facilities, or practices of public utilities or carriers." This is just such a proceeding, since by the terms of the Order of Investigation the Commission inquired into the facilities and practices of terminal operators. Terminal operators act in the nature of operators of public utilities in that they hold themselves out to perform a use or service to the public. Cf. Davies Warehouse v. Bowles, 321 U.S. 144 (1944) (public warehouse); and City of Oakland v. El Dorado Terminal Co., 106 P. 2d 1000 (Cal. Dist. Ct. App. 1940).

B. No Staff Member Who Engaged in the Investigation Participated in or Advised the Commission with Respect to Its Decision.

Counsel for petitioners was advised by letter from the Commission's Secretary, Thomas Lisi, dated July 29, 1966, that certain members of the Commission staff were present at the time the Commission voted in this proceeding on May 12, 1966. (J.A. 179). The letter is the basis for petitioners' contention that persons engaged in the investigation participated in and advised the Commission with respect to its decision.

J. L. Pimper was Acting Managing Director at the time the Commission voted to institute the investigation in 1963. He held that position for approximately one month, when a new Managing Director was appointed. At the time the Commission decided this case in 1966 he served as General Counsel and advised the Commission in that capacity. Petitioners' attempt to impute investigatory zeal to his later participation in an advisory capacity is unconvincing. First, it ignores the

long interval between commencement of the investigation and the decision, during which Pimper served as General Counsel and could not possibly have acted in an investigatory role. Second, Pimper served as Acting Managing Director for only one month. The likelihood of his active participation in the investigation in any substantial degree was minimal in view of his short tenure.

Affidavits of E. S. Johnson and W. Levenstein are submitted herewith. These staff members have investigative functions as members of the Commission's Foreign Regulation office and were present at the Commission meeting on May 12, 1966, at which time the Commission voted in this case. The affidavits state, however, that to the best of their knowledge they withdrew from the Commission meeting before Docket 1153 was considered, but that, in any event, they did not participate in the Commission's decision. Neither Secretary Lisi's minutes of the meeting (J.A. 180) or his letter to petitioners reflects their participation.

In response to a request from the Commission's Secretary, the Director of the Bureau of Domestic Regulation prepared a memorandum dated April 7, 1964, which was concurred in by the Managing Director. (J.A. 169). The memorandum, however, related to the enforcement of subpoenas in Docket No. 1153, an aspect of the proceeding not in issue here.^{14/} Further, and more important, petitioners' counsel was aware of the memorandum and had a copy of it at least as early as June 1965 when he produced it as an exhibit to a deposition taken in connection with the subpoena enforcement. It is therefore unmistakably clear that petitioners had ample opportunity, either in their exceptions which they filed with the

^{14/} According to minutes of a Commission meeting of May 7, 1964, the Commission in connection with the enforcement of subpoenas in Docket No. 1153 considered the memorandum of April 7, 1964. The minutes are open to the public.

Commission in October 1965 or at any other time prior to the Commission's decision in May 1966, to answer any material in the memorandum to which they objected.

CONCLUSION

For the reasons stated above, the order under review should be affirmed.

Respectfully submitted,

Donald F. Turner
Assistant Attorney General

James L. Pimper
General Counsel

Irwin A. Seibel
Attorney

Department of Justice

Robert N. Katz
Solicitor

Walter H. Mayo III

Joseph F. Kelly, Jr.
Attorneys

Federal Maritime Commission

Washington, D.C.
February 13, 1967

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

)
AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,)
)
Petitioners,)
)
v.) No. 20,286
)
FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)
)
Respondents.)
)
)

CITY OF WASHINGTON
DISTRICT OF COLUMBIA, SS.

AFFIDAVIT

EDWARD S. JOHNSON, being duly sworn, deposes and says:

1. That he is the Chief of the Office of Foreign Regulation of the Federal Maritime Commission;
2. That in such capacity he is required from time to time to attend meetings of the Federal Maritime Commission to advise the Commission with respect to compliance with its orders and the need to institute investigations;
3. That he attended one such meeting on May 12, 1966, for the sole purpose of advising the Commission, should the same be necessary, of compliance with the Commission's order of approval of Conference Agreement No. 5700-8, an agreement completely unrelated to the instant proceeding;
4. That the item of compliance with the Commission's order of approval of Agreement No. 5700-8 was the first item on the agenda of the May 12, 1966 meeting;

5. That the item of the Commission's Report and Order in its Docket No. 1153, the report and order under review in this proceeding, was number six on the agenda of that meeting;

6. That, to the best of his knowledge, he withdrew from the Commission meeting following the discussion of item number one on May 12, 1966;

7. That he has never participated in any discussions in a Commission meeting or with the individual Commissioners of the proceedings in Docket No. 1153;

8. And further your affiant sayeth not.

Edward S. Johnson

Dated: February 13, 1967

SWORN TO and SUBSCRIBED, before me:

Ruth May Burroughs
Notary Public, District of Columbia
My commission expires May 31, 1967.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,)
Petitioners,)
v.) No. 20,286
FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)
Respondents.)

CITY OF WASHINGTON
DISTRICT OF COLUMBIA, SS.

AFFIDAVIT

WILLIAM LEVENSTEIN, being first duly sworn, deposes and says:

1. That he is the Chief of the Division of Carrier Agreements, Office of Foreign Regulation, Bureau of Compliance, Federal Maritime Commission;
2. That in such capacity he is required from time to time to attend meetings of the Federal Maritime Commission to advise the Commission with respect to compliance with its orders and the need to institute investigations;
3. That he attended one such meeting on May 12, 1966, for the sole purpose of advising the Commission, should the same be necessary, of compliance with the Commission's order of approval of Conference Agreement No. 5700-8, an agreement completely unrelated to the instant proceeding;
4. That the item of compliance with the Commission's order of approval of Agreement No. 5700-8 was the first item on the agenda of the May 12, 1966 meeting;

5. That the item of the Commission's Report and Order in its Docket No. 1153, the report and order under review in this proceeding, was number six on the agenda of that meeting;

6. That, to the best of his knowledge, he withdrew from the Commission meeting following the discussion of item number one on May 12, 1966;

7. That he has never participated in any discussions in a Commission meeting or with the individual Commissioners of the proceedings in Docket No. 1153;

8. And further your affiant sayeth not.

William Levenstein

Dated: February 13, 1967

SWORN TO and SUBSCRIBED, before me:

Ruth May Burroughs
Notary Public, District of Columbia
My commission expires May 31, 1967.

ORIGINAL

Brief for Intervenor Empire State Highway
Transportation Association, Inc.
~~United States Court of Appeals~~
~~for the District of Columbia Circuit~~

IN THE

FILED MAY 26 1967

United States Court of Appeals
Nathan J. Paulson
For the District of Columbia Circuit

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA,

Respondents.

**PETITION FOR REVIEW OF ORDER OF FEDERAL
MARITIME COMMISSION**

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Of Counsel

February 20, 1967.

QUESTION PRESENTED

Was there substantial evidence of record to support the ultimate findings and conclusions of the Federal Maritime Commission?

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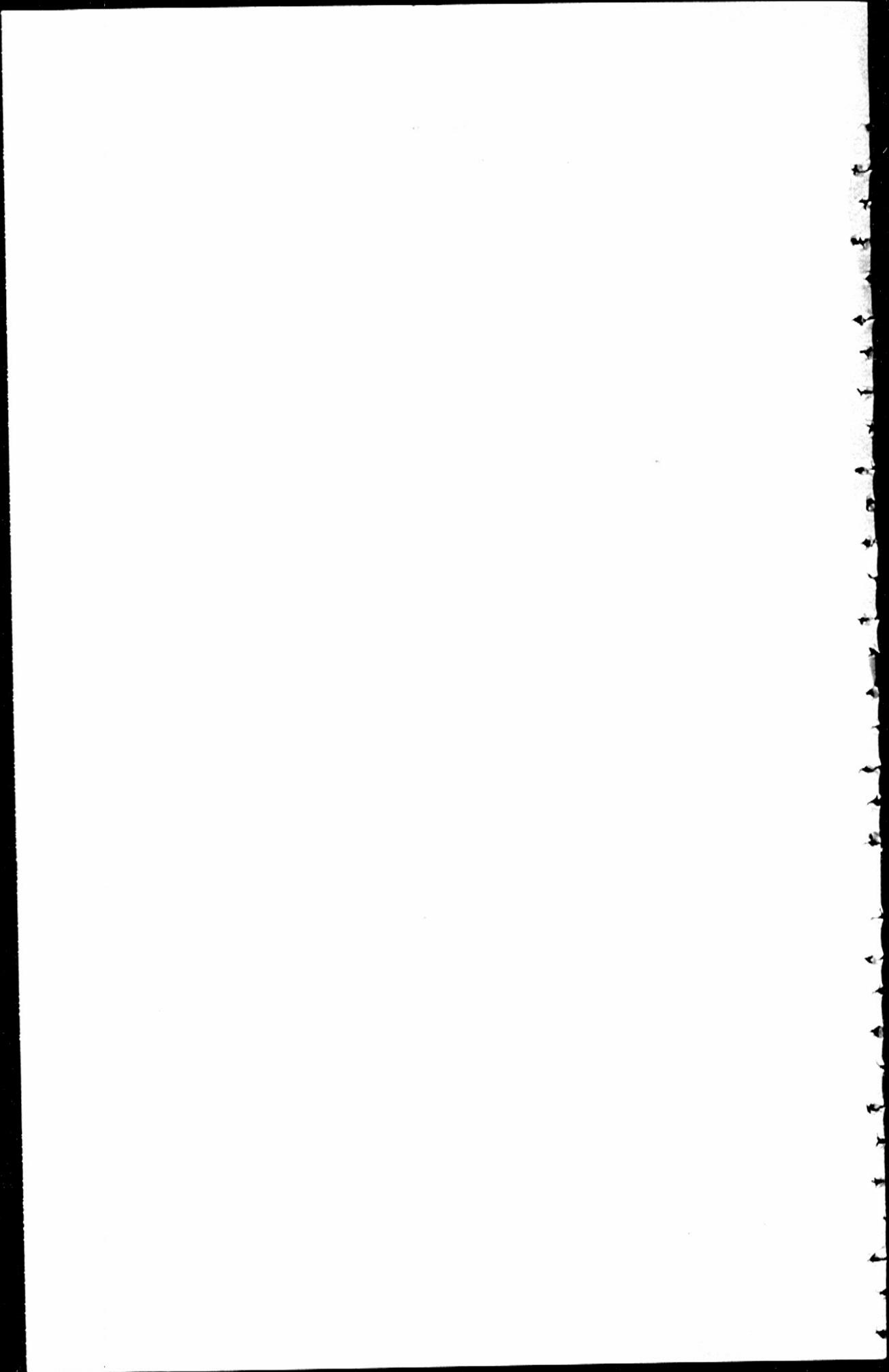
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For the District of Columbia Circuit

No. 20286

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Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES
OF AMERICA,
Respondents.

**PETITION FOR REVIEW OF ORDER OF FEDERAL
MARITIME COMMISSION**

Brief of Intervenor Empire State Highway
Transportation Association, Inc.

Preliminary Statement

This brief will be limited to the issues which relate to truck loading and unloading at the piers in the Port of New York.

Statement of the Case

On or about October 10, 1963 the Federal Maritime Commission ("Commission") instituted an investigation, *inter alia*, of the rates, rules, regulations and practices governing truck and lighter loading and unloading at the piers of the Port of New York. The respondents in the proceeding before the Commission (the petitioners herein) are terminal operators [stevedoring companies or steamship companies, in their capacity as terminal operators] who

operate piers in the Port of New York and handle and deliver waterborne cargo moving in foreign commerce. As part of their terminal operations, the petitioners provide the services of truck loading and unloading.

The Intervenor, Empire State Highway Transportation Association, Inc. ("Empire") is a non-profit membership corporation whose members are engaged in the transportation of property in interstate and foreign commerce by motor vehicle. The members of Empire pick up and deliver freight at the piers in the Port of New York and engage the services of the petitioners to load and unload the freight on and from their trucks at the piers.

The petitioners are members of the New York Terminal Conference and operate pursuant to a conference agreement approved under Section 15 of the Shipping Act, as amended [75 Stat. 763, 78 Stat. 148, 46 U. S. C. Section 814, ("Act")]. At the time of the hearing, the petitioners had issued Tariff No. 6 (J. A. pp. 161-164) which set forth the rates, charges, rules and regulations governing truck loading and unloading. Among other things, Tariff No. 6 provided:

"Item 16. Delay to Motor Vehicles

The Terminal Operator assumes no responsibility for delay to motor vehicles and no claims for such delay will be honored." (J. A. p. 163)

* * *

"Item 10. Three O'Clock Rule.

"A truck in line to receive or discharge cargo by 3 P.M. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, and is in all respects ready to be loaded or unloaded, is entitled to be serviced until completion at the straight-time tariff rates. This

rule should not apply to trucks unloaded without the services of the terminal operator." (J. A. p. 163) (Emphasis supplied)

Full and complete adversary hearings were held and every opportunity was accorded to the petitioners to present evidence with respect to the issues involved in the proceeding. The Presiding Examiner found that Item 16 was unjust and unreasonable and recommended that the petitioners adopt a tariff provision which would impose liability on their part for the detention of motor vehicles at the piers. (J. A. pp. 56, 58)

The Presiding Examiner also found that the 3:00 o'clock rule was unjust and unreasonable to the extent that it was inapplicable to truckers who unload their own trucks and he directed that the rule be amended to extend the application of the rule to truckers who unloaded their own trucks. (J. A. p. 57)

Exceptions were filed by the parties and oral argument was had before the Commission. On or about July 16, 1965, the Commission issued its final decision and held:

"We agree with the Examiner. It is neither just nor reasonable for respondents to disclaim liability for all delays and their attempt to do so was invalid under section 17. Whatever may be the difficulties in drafting a detention rule which takes into account those causes of delay which are beyond respondents' control, the truckers have a right to the rule, and section 17 demands it.

While we look with favor on the attempts of the parties to iron out their differences amicably, we cannot agree with respondents that their attempts to work out an 'appointment system' with the truckers obviate the need for the rule. Even if

respondents are correct in their assertion that an 'appointment system' will solve practically all of the problems of delay, the need for the rule remains. The issue here is what the trucker may reasonably expect as redress when delays occur not what may be done to remove the causes of delay. The latter is another problem entirely and while we are vitally interested in any attempts to eliminate or reduce delay, the validity of these attempts is not at issue here. Moreover, the establishment of the system alone does not deal with the problem of what the rights of the respective parties are if the system proves unworkable or when it breaks down.

Accordingly, we adopt as our own the Examiner's finding that respondents should delete Item 16 (which relieves them of all liability for detention) from Tariff No. 6 and insert a reasonable detention rule therein which will compensate the truckers for unusual truck delays caused by or under the control of the terminals. Respondents' disclaimer of all liability for delay and its failure to establish and apply such truck detention rule constitute unjust and unreasonable practices under section 17 of the Act."

* * *

"We also agree with the Examiner's finding that respondents presently give an unreasonable preference to lighter traffic over motor vehicle traffic in regard to detention payments, in violation of section 16 First of the Act."

* * *

"Respondents fail to recognize that the preference and prejudice need not arise from the actual payment to one as opposed to the other, but such pre-

ference and prejudice arise from the mere presence of the varying provisions in the two tariffs. The tariff No. 6 provision flatly states respondents will have no responsibility for detention payments for trucks. The Tariff No. 2 provision negatively states that respondents will not interfere with any claims for detention lightermen may hold against the steamship company. It is conceivable that truckers would also have detention claims against the steamship company, especially in the case of direct transfer when the terminal operator is acting as agent for the steamship company. By failing to recognize the right for truckers to collect detention and by expressly recognizing such rights for lightermen, respondents' tariffs give unreasonable preference to lighter traffic over truck traffic in violation of section 16 First of the Act." (J. A. pp. 75-77)

* * *

"The Examiner found that this rule was an unreasonable practice under section 17 of the Act. His finding was based on the fact that the last sentence of the rule would exclude truckers from the guarantees of the rule if they elected to perform their own unloading.

Respondents do not except to this finding, but propose to delete the rule, upon the institution of an appointment system.

The Examiner correctly found the rule to be unreasonable. The present rule does not guarantee a trucker who performs his own unloading that he will be serviced (furnished a checker and hilo) to completion. Thus, the rule can be used as a means to compel the trucker to use the unloading services of the terminal for which a charge would be assessed.

The tariff purports to allow the trucker to perform unloading himself. This cannot practically be accomplished under the present 3 o'clock rule. The rule constitutes an unjust and unreasonable practice under section 17 of the Act and should be amended to extend application thereof to cases where the trucker unloads his own truck." (J. A. p. 80)

Subsequently, petitioners filed their petition for review in this Court. Petitioners, then, moved for a full evidentiary hearing but a decision on this motion was deferred pending argument on the merits of the appeal.

Summary of Argument

Petitioners plainly misconceive or misconstrue the issues before this Court. The record here shows that there was substantial evidence in support of the conclusions reached by the Commission, namely, that petitioners should include in their tariff reasonable detention rules for truck loading and unloading at the piers and that the 3:00 o'clock rule was unreasonable if it was not extended to truckmen who unloaded their own trucks.

The decision of the Commission is not inconsistent, vague, ambiguous or capricious nor was the relief granted beyond the statutory powers of the Commission. Simply stated, the baseless contentions advanced by the petitioners are designed only to obfuscate the single issue before this Court, i. e., was there substantial evidence of record to support the final order of the Commission?

Whether the proceeding before the Commission was adjudicatory or involved rule making, there was compli-

ance with the provisions of the Administrative Procedure Act. [60 Stat. 237, 5 U. S. C. §1001 et seq. recodified in Pub. Law 89-554, 80 Stat. 378) ("APA")] Petitioners had adequate notice of the issues involved in this proceeding and were afforded every opportunity to advance their contentions and present their evidence. Furthermore, there was no commingling of prosecutorial and judicial functions by the Commission and petitioners' motion for a full evidentiary hearing as to this issue should be denied.

POINT I

There was substantial evidence of record to support the findings of the Commission.

The standard for judicial review of an order of the Commission was recently re-affirmed by the United States Supreme Court in *Consolo v. Federal Maritime Commission*, 383 U. S. 607 (1966) where the Supreme Court held:

"In effect, the standard review applied and articulated by the Court of Appeals in this case was that if 'substantial evidence' or 'the substantial evidence' supports a conclusion contrary to that reached by the Commission, then the Commission must be reversed. This standard is not consistent with that provided by the Administrative Procedure Act.

Section 10(e) of the Administrative Procedure Act (5 U. S. C. §1009(e) (1964 ed.) gives a reviewing court authority to 'set aside agency action, findings, and conclusion found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence . . .' Cf. *United States v. Interstate Commerce Comm'n.*, 198 F. 2d 958, 963-964, cert. denied, 344 U. S. 893. We have

defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106; *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F. 2d 18, 21.

Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency. These policies would be damaged by the standard of review articulated by the court below." (pp. 618-621)

See too:

Far East Conference v. United States, 542 U. S. 570 (1952);
Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474 (1951);
States Marine Lines, Inc. v. Federal Maritime Commission, 114 U. S. App. D. C. 225 (1963), cert. den. 374 U. S. 831 (1963).

A review and analysis of the record before the Commission proves, beyond contradiction, that substantial evidence of record support the findings and conclusions of the Commission.

A) Truck Detention:

At the hearings, witnesses again and again testified to the unreasonable detention of motor vehicles at the piers which is traceable to the petitioners. Not only do motor vehicles have to remain in line for an inordinate amount of time before they receive service from the terminal operators, but when the petitioners commenced the service the amount of time required to either load or unload was unduly excessive. [Exs. 49, 51, 52, Tr. 761, 896-897, 967-968, 2024, 2050 (J. A. pp. 130, 131, 132, 138, 139)]¹ The

¹ Exhibits 49, 51 and 52 were not re-produced in the Joint Appendix by reason of technical printing problems. Pursuant to an agreement with petitioners, copies of these exhibits will be presented to the Court at the time of oral argument. Additionally, the following portion of the transcript was inadvertently omitted from the Joint Appendix:

"Q. What problem did you experience at 36th Street, Brooklyn? A. We had a truck down there at 7 o'clock in the morning. He was routed at 8 o'clock. He started to work about 9:30.

He was getting 1,480 cases of hams. At 4:30 he had 200 cases to go, when he was told by the dock boss that that was it, wrap it up, they were all going home.

testimony overwhelmingly supported the following findings of the Examiner:

"78. The record shows that there is congestion and excessive delay in truck loading and unloading at the piers; that normal delays run from one to several hours; and that the trucks begin arriving at the piers more than one hour before they open in order to offset the delay they will experience.

79. One trucker experienced an instance as follows: He arrived at the pier at about 7:00 a.m. for a load of hams (1480 cases), was routed at about 8:00 a.m., started work at about 9:30 a.m., at about 4:30 p.m. when still not loaded was told that all were going home, and about 5:30 p.m. the terminal decided to finish loading, which it did, and the truck got off the pier at about 9:00 p.m.

80. Delay is perhaps the greatest single problem involving truck traffic. Witness after witness attested to the inconvenience and expense to motor carriers resulting from the chronic delay of vehicles delivering or receiving cargo at the piers. These delays are a serious problem to the motor carriers because the resulting inefficient use of equipment and labor tends to increase operating costs, thus

So he walked up the dock, and he called our office, and he said that everybody's going home, nobody is going to finish loading him. Right off the bat, I made one telephone call to somebody over the line. Johnny called the customer. The customer called one of the vice presidents of the steamship company, because the technical problem involved here—it meant carrying a refrigerated trailer from Thursday afternoon to Monday morning to pick up 200 cases of hams.

Finally at about 5:30, quarter to 6:00, they decided they were going to finish loading the truck. And I think the truck got off the pier at 9-something that night, Thursday night. So he was there from prior to 8 o'clock until about 9 o'clock Thursday night" (Tr. 2018-2019, Martin H. Michael).

affecting their ability to compete with other modes of transportation. They are a problem to shippers and receivers because such increased costs are necessarily passed on to them in the form of higher rates. . . ." (J. A. pp. 32-33)

The Commission, after consideration of exceptions filed by the parties and after oral argument, also found:

"The record shows that there is congestion and excessive delay in truck loading at the piers, that normal delays run from one to several hours, and that the trucks begin arriving at the piers more than one hour before they open in order to offset the delay they will experience. One trucker offered the following example: He arrived at a pier at about 7:00 a.m. for a load of hams (1,480 cases); was routed at about 8:00 a.m.; started work at about 9:30 a.m.; at about 4:30 p.m. when still not loaded was told that all were going home; and about 5:30 p.m. the terminal decided to finish loading, which it did; and the truck got off the pier at about 9:00 p.m." (J. A. p. 66)

The incontrovertible evidence of record supported the ultimate findings and conclusion of the Commission, as set forth at pp. 3-4, *supra*, that petitioners should include in their tariffs a reasonable detention rule which would compensate motor carriers for unusual truck delays caused by or resulting from the omissions of the petitioners.

B) Three O'Clock Rule:²

The Examiner and the Commission determined that the 3:00 o'clock rule should also apply when motor carriers unload their own trucks without engaging the services of

² This issue was not rendered moot by petitioners issuing a new tariff. The matter can arise again and the Commission's decision should stand as setting forth a standard for the future.

the petitioners. Here, too, the evidence of record did not suggest, let alone establish, a valid reason for the discriminatory effect of the rule. Petitioners alleged that this aspect of the rule was necessary because the petitioners could not control the speed of the operations. Indeed, it was the Hearing Counsel for the Commission who argued that the contentions advanced by the petitioners were without merit and the 3:00 o'clock rule should be extended to the motor carriers which unload their own truck. After considering and weighing all of the evidence, the Examiner and the Commission concluded that truckmen who did their own unloading should receive the benefits of the 3:00 o'clock rule. Clearly, this is a matter within the competence of the Commission and the Court ought not to substitute its own judgment for that of the Commission, particularly where substantial evidence supports the ultimate findings of fact and the conclusions of the Commission.

POINT II

The decision and order of the Commission are neither void, vague, ambiguous, arbitrary nor do they exceed the statutory powers of the Commission.

Petitioners persist in their erroneous contention that the challenged order is void, vague, ambiguous, arbitrary and beyond the jurisdiction of the Commission. The touchstone of every decision involving the validity of an order of an administrative agency is whether the agency has set forth adequate basic facts which support the ultimate findings of fact and whether the conclusions of law are rational. Neither the Act nor the APA nor decisional precedents require a detailed statement of every subsidiary evidentiary fact. It is sufficient if the agency makes clear

the factual basis upon which it has proceeded and the reasoning employed in arriving at its decision. [*Chicago & Eastern Illinois Railroad Co. v. United States*, 375 U. S. 150 (1964); *King v. United States*, 344 U. S. 254 (1952); *Public Utilities Commission v. Federal Power Commission*, 205 F. 2d 116 (CA-3, 1953)]. In the case at bar basic findings of fact, ultimate facts, conclusions and the reasoning of the Commission were clearly enunciated in its decision.

Petitioners' arguments are not novel. In *Brotherhood of Maintenance of Way Employees v. United States*, [221 F. Supp. 19 (E. D. Mich. 1963), aff'd 375 U. S. 216 (1964)], identical contentions were rejected by the Court which held:

"Plaintiffs further attack the Commission's report by arguing that the Commission's report is fatally deficient in that it lacks adequate subsidiary findings. Section 8(b) of the Administrative Procedure Act, 5 U. S. C. A. §1007 (b), provides that decisions of administrative tribunals shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion. This statutory provision requires subsidiary findings only upon those issues which are material, but not those which are collateral. *Minneapolis & St. Louis R. Co. v. United States*, 361 U. S. 173, 193-194, 80 S. Ct. 229, 4 L. Ed. 2d 223. To comply with this rule, it is enough if an administrative agency, such as the Interstate Commerce Commission, sets forth in its decision a reasonable review of the evidence before it, the weight which has been given to such evidence, its own resolution of the conflicts therein, and expresses its findings and conclusions necessary to support its ultimate findings. *Alabama Great Southern R. Co. v. United States*, 340 U. S.

216, 227-228, 71 S. Ct. 265, 95 L. Ed. 225, 237; *Minneapolis & St. Louis R. Co. v. United States*, 361 U. S. 173, 193, 80 S. Ct. 229, 4 L. Ed. 2d 223. The findings expressed by the Commission in its report sufficiently exposed its view of the evidence and the basis upon which it came to its ultimate conclusion that the criteria essential to approval were present and established by the proofs made before it on its extended hearing. We are of the opinion that the findings it made were adequate to support its order." (p. 27).

In an attempt to confuse the issues, the petitioners create strawmen and then, like Don Quixote, proceed to demolish them. Each of these fallacious arguments will be answered seriatim:

At pp. 1-4 of their brief, petitioners rely upon the Commission's observation that delay may be caused by many factors and, hence, a general rule will be difficult to apply in a given instance. However, the petitioners ignore the Commission's specific finding that " * * * most of the delays are within the control of respondents". (J. A. pp. 74-75)³

It is fundamental that a tariff is essentially a statement of law. A detention rule in the tariff must be general in terms and cannot be so detailed as to cover every conceivable situation. A case by case basis will determine the reach and ambit of the rule. Thus, in accord with a practice

³ The reasonableness of the Commission's decision is self-evident since petitioners are exonerated for delay which they cannot control.

The page references are to petitioners' typewritten brief since their printed brief was not available prior to filing of this brief.

traditional in our legislative and judicial system, the petitioners have been directed to adopt a detention rule in order to comply with the Act. If necessary, the application of the rule will be determined in subsequent proceedings. If the petitioners' contentions were meritorious, then the legislative and judicial machinery of this country would grind to a halt. In short, subsequent decisions will resolve (and expose) the artificial issues raised by petitioners such as "causation", "place of suit", etc., as they do each day in the field of regulated transportation.

In a comparable area, relating to free time and demurrage charges for cargo, persons subject to the Act have been required to follow the regulations of the Commission as set forth in 46 C. F. R. Part 526 to assess demurrage charges pursuant to broad standards. Thus, the regulations provide that free time may be shortened because of the "special nature" of the cargo or because the pier is not "equipped" to care for the cargo. So, too, the amount of demurrage charges is dependent upon the consignees' inability to remove cargo from the piers for reasons "beyond his control". These general principles have not prevented compliance with, or enforcement of, the law. Indeed, the petitioners have had no difficulty in accepting liability for the detention of lighters pursuant to the following all inclusive rule in their lighter tariff which is not detailed or specific:

"Nothing contained herein shall be construed as affecting whatever rights lighter operators have with regard collection of lighterage detention charges from steamship companies." (J. A. 159)

In short, petitioners seek to avoid their liability for truck detention by creating imaginary, insurmountable problems when, in fact, none exist.

The factitious nature of petitioners' arguments is made clear by their contentions at p. 14 of their brief that they are not responsible for delay even when caused by their employees. This is an absurdity. Petitioners cannot escape responsibility for the conduct of their employees which cause delay at the piers. If their contention is sound, then all regulation becomes meaningless.

Petitioners (pp. 10-13 of their brief) also mistakenly allege that the Commission did not consider their proposal to establish an appointment system which they claim would reduce delay at the piers. This is contrary to the express findings of the Commission that the institution of an appointment system would be salutary but, standing alone, does not satisfy the duty of publishing a truck detention rule. As the Commission stated, the appointment system will not guarantee against delays at the piers which are attributable to the petitioners and for which they should be responsible. (J. A. p. 75) The appointment system was not novel and experience had demonstrated that it did not eliminate truck delays at the piers. (Tr. 2050; J. A. p. 138). On the other hand, if the appointment system does become meaningful and delay on the piers is ended, then the petitioners have nothing to fear about a truck detention rule. The Commission did consider all factors relating to an appointment system and in the exercise of its expert judgment properly determined that the appointment system did not absolve petitioners from the obligation to publish a truck detention rule.

There can be no question about the Commission's power and jurisdiction to direct petitioners to adopt a truck detention rule as part of their tariffs. Petitioners mistakenly rely upon the decision of the Commission in *J. M. Altieri, etc.* [7 F. M. C. 416 (1962)] and assert that Section

17 of the Act (39 Stat. 734, 46 U. S. C. Section 816)⁴ is not applicable because the detention rule will not relate to the "handling of property". The Commission viewed the detention rule as a means of insuring more expeditious handling of property at lower cost. Thus, the Commission found that delay was a "problem to shippers and receivers because the increased costs are necessarily passed on to them in the form of higher rates". (J. A. p. 66) Clearly, then, the ultimate effect of the detention rule will be to reduce the costs of handling waterborne cargo and falls within the scope of Section 17 of the Act. The decisions of the Commission make it perfectly clear that it has jurisdiction under Section 17 of the Act to require the inclusion of a truck detention rule in petitioners' tariff. [*Transportation of Lumber Through Panama Canal*, 2 U. S. M. C. 143; *Storage Charges Under Agreements, Etc.*, 2 U. S. M. C. 48; *Penna. Motor Truck Association v. Phila. Piers, Inc.*, 3 F. M. B. 789.]

Petitioners reluctantly acknowledge the applicability of a detention rule with respect to the loading and unloading of lighters. Their only argument is that the lighterage companies should collect the detention charges from the steamship companies rather than the petitioners. Still, if a detention rule is applicable to the unloading and loading of lighters, there is no question that a detention rule may also apply with respect to the loading and unloading of trucks. Surely, there is no rational basis for

⁴ "Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

discriminatory treatment between lighters and trucks as the Commission correctly noted. (J. A. pp. 76-77) Actually, the publication of a detention rule for lighters and not for trucks violates Section 16 First of the Act (39 Stat. 734, 46 U. S. C. Section 815 First); a discriminatory practice which the Commission has jurisdiction to remedy.

The reliance by petitioners on the decision in *Detention of Motor Vehicles, etc.* [318 I. C. C. 593, 323 I. C. C. 336 (1962)] is equally misplaced. To begin with, the cited case is inapposite because the Interstate Commerce Commission in that case stated that terminal operators could not be held liable for detention charges because they were not parties to the contract of transportation. Not only terminal operators but warehousemen and similar persons could not be held responsible for detention charges since they were neither the consignees nor the consignors of the shipment and therefore were not direct parties to the contract of transportation. To have imposed liability would have violated Section 223 of the Interstate Commerce Act (49 Stat. 565, 49 U. S. C. Section 323) and Section 42 of the Bills of Lading Act (39 Stat. 545, 49 U. S. C. Section 122). However, in the case at bar, the respondents are parties to the truck loading and unloading contract and the Commission may hold them liable for detention of motor vehicles which result from causes within their control.

At pp. 16-18 of their brief, petitioners again incorrectly contend that the Commission's direction to the petitioners to adopt a detention rule for truck loading and unloading violated the provisions of section 2(c) of the APA. (60 Stat. 237, 5 U. S. C. §1001(c)) But we are not dealing with a rule-making proceeding. Petitioners can hardly complain since the hearings in this case were conducted pursuant to the more stringent provisions of section 5 of the APA (60 Stat. 239, 5 U. S. C. Section 1004).

Petitioners' reliance upon *Detention of Motor Vehicles, etc., supra*, defies understanding. The fact that the Interstate Commerce Commission in that case decided to proceed by way of rule-making does not establish that the Commission, in this case, was obliged to institute rule-making proceedings.⁵ Furthermore, the case of *American President Lines, Ltd. v. Federal Maritime Board*, [115 App. D. D. 187, 317 F. 2d 887 (1962)] is not controlling. That case held that where there was an amendment of existing Commission regulations and not an interpretation of these regulations, the APA was violated since the final order was not accompanied "by a statement of the basis and purpose of the order" (p. 891) and the cause was remanded to the Commission for further proceedings. However, in the instant case, the decision of the Commission comprehensively sets forth the basis and purpose for inclusion of a detention rule in petitioners' tariff. [*Cf. Hoving Corporation v. Federal Trade Commission*, 290 F. 2d 803 (CA 2, 1961)]

Petitioners were not denied due process of law nor did the Commission act contrary to the mandate of the APA. They were apprised of the issues in the proceeding and had every opportunity to present their evidence and views and these were fully considered by the Commission. Whether the proceedings be denominated adjudicatory, (which they were) rule-making or both, the Commission acted in accordance with law. [*Shapiro, The Choice of Rulemaking or Adjudication In The Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965)].

⁵ Empire did not concede in its reply to petitioners' motion for a full evidentiary hearing that this proceeding was a rule-making proceeding. It merely alleged that since question of rates was involved the proscriptions of Section 5(c) of the APA were not applicable.

In sum, the decision being reviewed by this Court forecloses any need for speculation by this Court as to the basis for the Commission's action: all of the necessary subsidiary findings, ultimate findings and conclusions are carefully delineated and there is no question as to the jurisdictional basis for the Commission's action.

POINT III

Petitioners' motion for a full evidentiary hearing should be denied.

Empire has filed a reply to petitioners' motion for a full evidentiary hearing. In order to avoid unduly burdening the Court with a repetition of its arguments, it respectfully requests that the reply be incorporated herein. Petitioners have not advanced in their brief any further basis for finding that there was a prohibited commingling of prosecutorial and judicial functions.

CONCLUSION

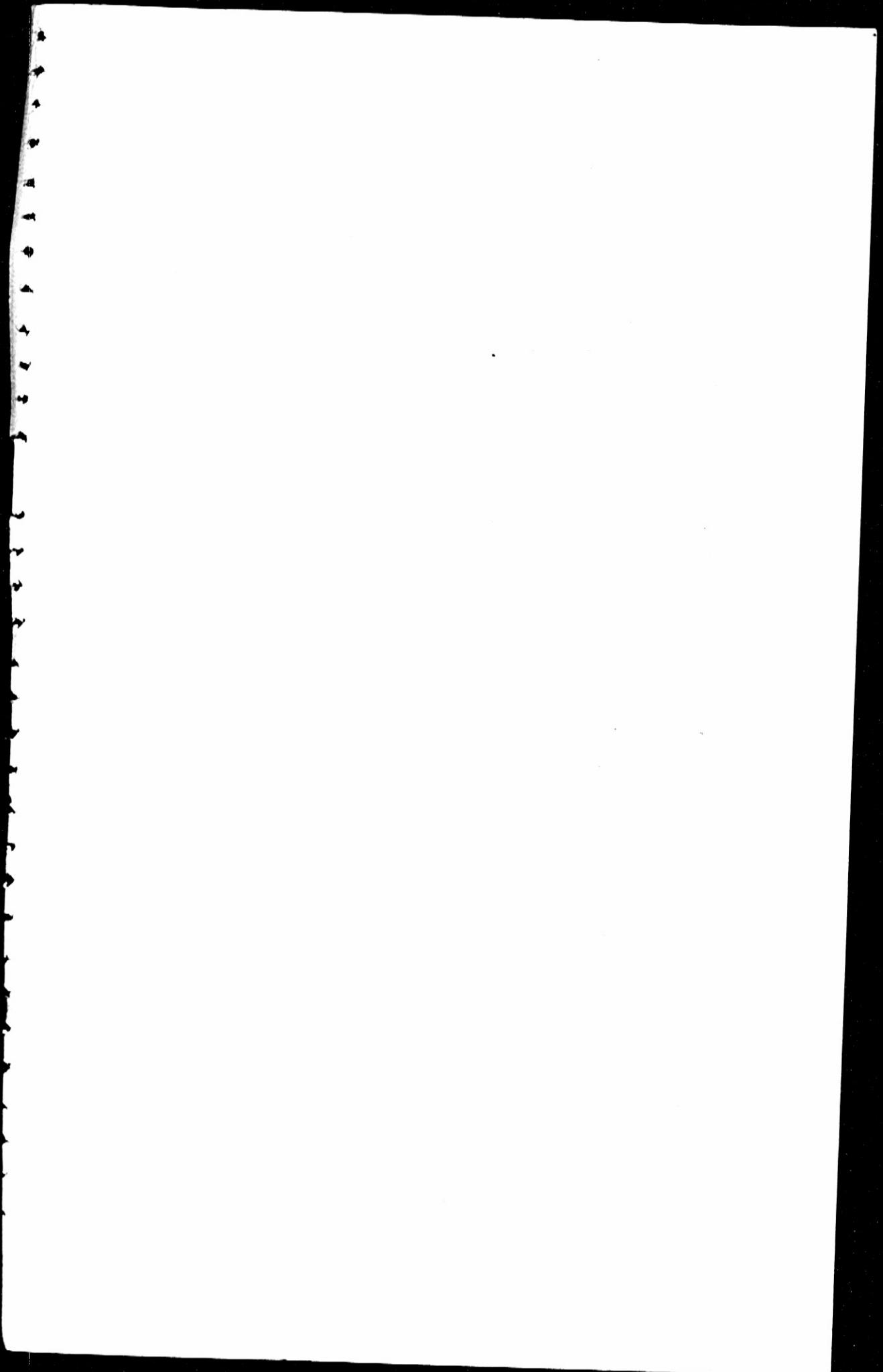
The order of the Commission should be affirmed in all respects.

Respectfully submitted,

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~~Original~~

BRIEF OF INTERVENOR'S, HARBOR CARRIERS
OF THE PORT OF NEW YORK, <sup>United States Court of Appeals
of Columbia Circuit</sup>
APPENDIX

~~FILED MAY 28 1967~~

IN THE *Nathan J. Paulson*
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20286

AMERICAN EXPORT-ISBRANDTSEN LINES,
INC., *Et al.*,

Petitioners,

vs.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,

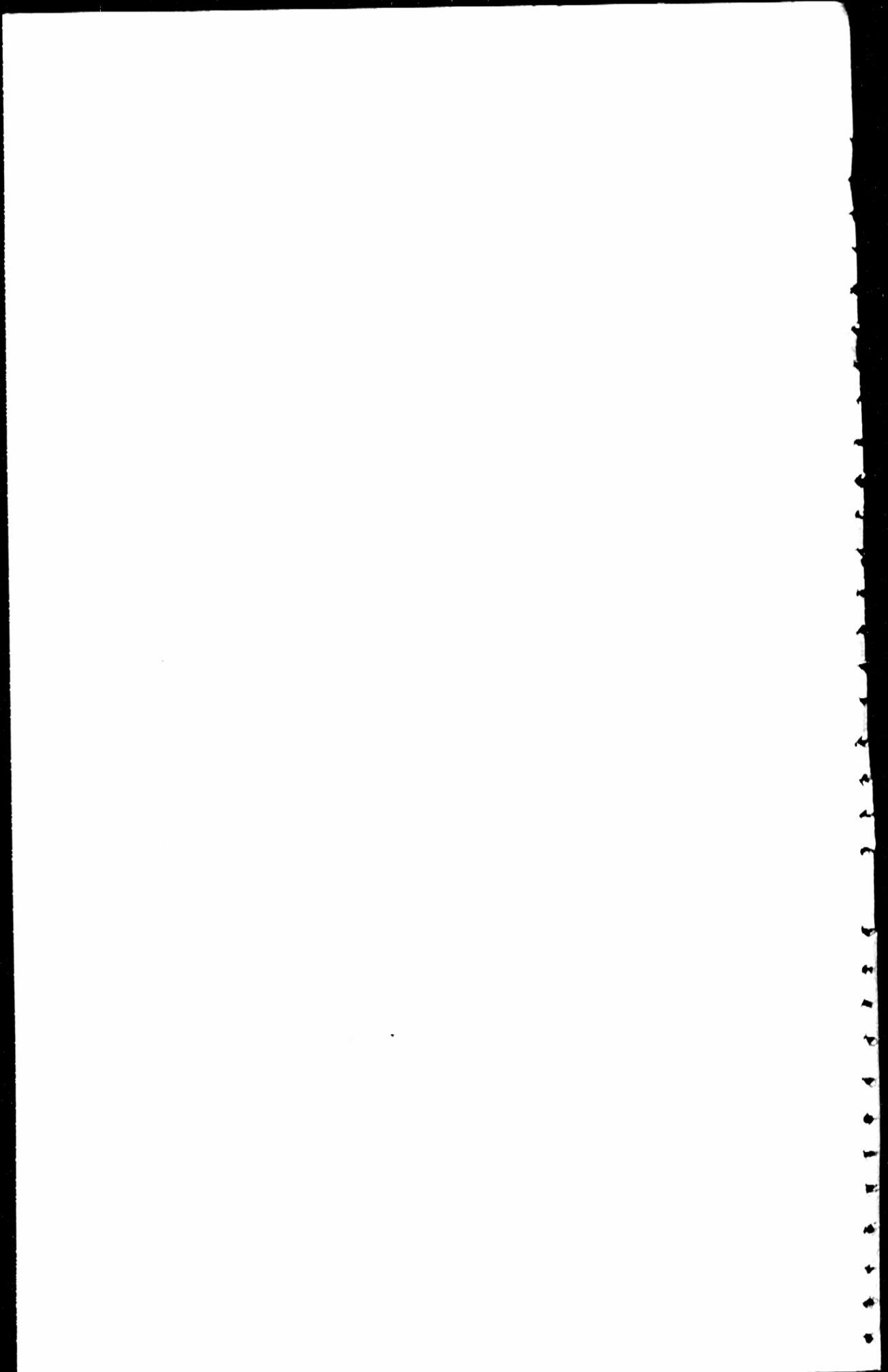
Respondents.

Petition for Review of Order of
Federal Maritime Commission

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Statement of Questions Presented

Intervenors, referred to as "lightermen" in the report of the Commission, are the operators of non-self-propelled vessels which carry import and export cargo between petitioners' ship terminals in New York Harbor and the piers, plants and warehouses of the shippers or consignees of such cargoes. They are hired and paid by the shippers or consignees of the cargoes. The order of this Court permitting intervention was filed August 15, 1966.

These intervenors are effected by so much of the report and order as holds:

1. That the imposition of a charge on lightermen by petitioners for the service of transferring cargo directly between lighters and ships, without the cargo coming to rest on the pier, is unjust and unreasonable since it results in a double charge on cargo, the shipowner having paid for the petitioners' services out of the ocean freight rate paid by the cargo owner (Report J.A. 70-71); *
2. That it is unjust and unreasonable for petitioners to fail to adopt a just and reasonable lighterage detention rule or regulation in their lighterage tariff (Report J.A. 73);
3. That the tariff provision to the effect that petitioners will make no charge for transferring directly between ship and lighter heavy lift freight received from or destined to a railroad is selective treatment in favor of the railroad lighters and results in discrimination by petitioners against these private lightermen (Report J.A. 79);
4. That petitioners must publish tariff charges for handling to or from lighters cargo which comes

* References J.A. are to the Joint Appendix.

to rest on the pier before or after transfer to or from a ship, if petitioners offer to perform that service (Report J.A. 78-79).

Throughout the hearings before the Examiner these intervenors were represented by counsel who cross-examined petitioners' witnesses and called witnesses on behalf of these intervenors. Intervenors' counsel also filed briefs and participated in the oral argument before the full Commission.

Although these intervening lightermen are seriously effected competitively by the practices of terminal operators in respect of trucks, they did not participate in the matters raised by the truckmen during the Commission's investigation and this brief will be confined to matters which directly effect lightermen.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 20286

**AMERICAN EXPORT-ISBRANDTSEN LINES, INC., *Et al.*,
Petitioners,**
vs.

**FEDERAL MARITIME COMMISSION and UNITED
STATES OF AMERICA,
Respondents.**

Petition for Review of Order of
Federal Maritime Commission

**BRIEF OF INTERVENOR'S, HARBOR CARRIERS OF
THE PORT OF NEW YORK, JAMES HUGHES, INC.,
HENRY GILLEN'S SONS LIGHTERAGE LINE, INC.,
McALLISTER LIGHTERAGE LINE, INC. AND PETTER-
SON LIGHTERAGE & TOWING CORPORATION**

**Counter Statement of the Case Relating to
Lighter Practices**

The lighters here involved are non-self-propelled vessels varying in length from 110 to 120 feet and in width from 34 to 40 feet, which carry their cargoes on an open deck in a space approximately 85 to 90 feet long by 30 to 35 feet wide (Report J.A. 64; Photograph, Exhibit 46).

When a shipper or consignee of ocean cargo decides that its cargo will be handled in the Port of New York by lighter, the ocean carrier issues such shipper or consignee a "permit" giving a range of two dates within which the lighter must arrive at the pier to pick up or deliver such cargo and the shipper or consignee forwards

the permit to one of these private lightermen. The shipper or consignee pays the charges of the lighterman which charges include his payments for loading or unloading the lighter (Report J.A. 63-64). The terminal operator (one of these petitioners), without consulting either the shipper or the consignee or the lighterman, and solely for its own reasons, decides whether the involved cargo will be transferred directly between the ship and the lighter without coming to rest on the pier (referred to as over-the-side) or whether the terminal operator will discharge the cargo from the ship's hold to the pier, moving it to another point or place of rest on the pier to await subsequent transfer from the pier to the lighter (Report J.A. 63).¹

The permit issued for the lighter's arrival gives no indication whether the terminal operator will handle the cargo over-the-side directly between the ship and the lighter or instruct that the lighter pick it up from a place of rest on the pier to which the terminal operator has carried it after removing it from the ship's hold. The first notification the lighterman receives of the terminal operator's decision as to the method of handling is given when the lighter arrives at the pier (Report J.A. 63-64).

Prior to the institution of the subject investigation the petitioners had issued Lighterage Tariff No. 2 replacing Lighterage Tariff No. 1 in respect to both of which these intervenors filed protests with the Commission (J.A. 6). Those tariffs stated charges to be collected by the terminal operators for over-the-side handling of lighter cargo. The charges were in two classifications, one set of rates being

¹ Export cargo is handled in the reverse manner, i.e., the terminal operator determines whether the cargo will be transferred from the lighter to a place of rest on the pier and thereafter moved by the terminal operator from that place of rest to a point under the ship's tackle and then lifted into the hold of the ship. Since the procedure for export and import cargo is the same except in reverse order, we shall, for convenience and brevity, refer to import cargo arriving in the Port of New York by ocean carrier and carried to ultimate destination by lighter.

applicable to cargoes of less than 100 tons and another applicable to cargoes in greater quantities. The lighter-men here involved are concerned primarily with the volume rates since the lesser volume shipments are moved in the main by railroad lighters (J.A. 7).

Although petitioners' tariffs state rates for the direct over-the-side transfer, no cargo owner or lighter-man may request or order a terminal operator to handle cargo to the lighter over-the-side (Report J.A. 63; 7). The petitioners reserve the right to make that decision and handle cargo over-the-side when it suits their convenience or necessity. In making that decision no terminal operator ever consults the lighter-man (Report J.A. 63).

When the terminal operator, for its own reasons, decides that cargo destined for a lighter will be unloaded from the ship to the pier, the terminal operator's employees carry that cargo from the end of the ship's tackle to a place of rest on the pier. When the lighter-man is advised of that situation he makes his own arrangements with an independent stevedoring company, generally Wm. Spencer & Son, for it to supply a gang of men to come to the pier and transfer the cargo from the point where the terminal operator's employees have left it, to the lighter's deck (Report J.A. 63). In that situation the lighter-man controls the time when the independent stevedore's gang will work, whether at straight time or overtime and they work without interruption except for meals. The lighter-man pays the independent stevedore a negotiated rate for its work but the lighter-man knows precisely when his vessel will be ready to leave the pier and he may schedule her for another job with definite knowledge that the lighter will be able to meet that schedule (Report J.A. 63). When the terminal operator, for its own reasons, decides to place a lighter's cargo at a place of rest on the pier, the terminal operator, under his contract with the ocean carrier is required to (a) remove the cargo from the ship's hold and carry it to a place of rest on the pier where it

will remain and be readily accessible to the lighterman for transfer to his lighter, (b) assume responsibility for the cargo until the lighterman is ready to remove it from its place of rest on the pier, and (c) provide the place on its busy pier where the cargo may rest safely until it is picked up by the lighterman within the five days free time allowed for storage of cargo on a pier (Report J.A. 72-73; 55). While the cargo is lying at rest on a pier awaiting pick-up by the lighterman it adds to the general congestion on the pier with resultant delays and inconveniences to the terminal operator who must maneuver its mechanized gear around that cargo while moving other shipments between ship's tackle and their various places of rest on the pier (Report J.A. 72-73).

When a terminal operator decides that it is more suitable to his purposes for cargo to be discharged directly over-the-side from the ship to the lighter without coming to rest on the pier, there are many advantages to the terminal operator and many disadvantages to the lighterman (Report J.A. 70-71). The terminal operator saves the expense and inconvenience of providing storage space on the pier. The terminal operator has no responsibility for any part of the cargo after it has reached the lighter's deck, the lighterman being responsible for its safety at all times while on board the lighter (Report J.A. 64-65). The terminal operator saves the time of his longshoremen in carrying the goods from the end of ship's tackle to the point of rest on the pier (Report J.A. 64-65). Since the lighter, under direct transfer, is placed on the side of the ship opposite to the pier, one gang of the terminal operator's longshoremen may be loading from the ship's hold to the lighter through a particular hatch of the ocean ship while another gang handles cargo from the ship's hold to the pier through the same hatch (Report J.A. 64). If the terminal operator decides to work cargo through a given hatch to only one lighter moored on the offshore side of the ship, the lighter is so moored that the ship's tackle is

above her midsection and the greatest distance any cargo need be moved on the lighter is 45 feet, which distance diminishes as the loading of the lighter progresses. If, for its own convenience, the terminal operator desires to load two lighters simultaneously from the same hatch of the ship, the ship's tackle will fall near one end of the lighter and the first draft of cargo is moved not more than 90 feet to the most remote part of the lighter's cargo space, the distance diminishing as the loading of the lighter progresses (Report J.A. 64). But the terminal operator when working two lighters from the same ship's hatch has the advantage of faster unloading of the ship (Report J.A. 64-65).

When a terminal operator elects to work lighter cargo over-the-side the lighterman has no control over the time when the work will be done. Frequently lighter cargoes are handled over-the-side at night only, the lighter lying idle all day and the lighterman being obliged to pay overtime to its lighter captain and its cargo checker for their night work. Very often over-the-side loading of a lighter, once begun at night, will be suspended after two or three hours of night work and not resumed until the following night or one or two nights later, when after another two or three hour work period, a second and perhaps a third suspension will occur (Report J.A. 64, 72-73). The lightermen's union agreement provides that their men be paid overtime commencing at the end of straight-time hours and ending when loading ends even though the actual work on a given night might begin at 1 or 2 a.m. and be suspended or completed within one or two hours. The lighterman is not recompensed by the terminal operator for that expense (Report J.A. 64).

When a terminal operator decides to work a lighter over-the-side, the lighterman can not foretell when the lighter will be completely loaded and therefore may not schedule the vessel for another job. That condition frequently makes it necessary for the lighterman to hire a

lighter from another owner to perform the next scheduled job. The hired lighter necessarily remains on hire until its cargo has been delivered thereby making it necessary for the lighterman who chartered it to pay for the hired substitute for a number of days even though his own vessel may have finished her work one day after the substitute had been hired and may lie idle during a large part of the period that the substitute is on hire (Report J.A. 64). The condition could be remedied if the terminal operator would agree to load a given number of tons of cargo within a fixed time.

The movement of cargo on the deck of a lighter after being cleared from the ship's tackle could be expedited if the terminal operators would permit the lighterman's employees to work along with their employees. For example, by taking in or slackening the lighter's lines to the ship a clear space on the lighter's deck could be brought under the ship's tackle as loading progresses thus eliminating the necessity for moving cargo on deck. Or lightermen's employees could help move cargo from the ship's tackle (Report J.A. 73). But the terminal operators will not allow that. They insist that all such work be done by their employees (Report J.A. 65).

Both Lighterage Tariff No. 1 and No. 2, issued by the petitioners, provided that lighter cargoes of certain weights received from or destined to a railroad would be handled over-the-side without charge. There was no similar provision applicable to privately owned lighters (Report J.A. 79, Ex. 16).

The Commission's Conclusions

The Commission concluded that petitioners ordered over-the-side handling of lighter cargoes solely for their own convenience; that when they did so they incurred no extra expense not included in their contracts with the ocean carrier; that they imposed unnecessary and undue burdens on lightermen when they did so and that the

lightermen had no right to request or demand that any particular cargo be handled over-the-side even if willing to pay the charge therefor.

The Commission also concluded that the imposition of a charge for such work by petitioners constituted a double charge on the cargo because the ocean freight rate paid by the shipper included the cost of moving the cargo between the ship's hold and a place of rest on the pier away from the ship's tackle, which operation is in all respects similar to direct transfer between ship and lighter. The Commission reasoned that since the lightermen's charges to the shipper or consignee necessarily included the terminal operator's charges to the lightermen, and were paid by the shipper or consignee of the cargo, the cargo in fact paid twice for the same service of moving the goods from the ship's hold to the first place of rest.

The Commission further concluded that it constituted discrimination against private lightermen for petitioners to perform certain services for railroads without charge, at the same time charging private lightermen for similar services.

Since the petitioners admitted that they were willing to perform a service of transferring cargo between a place of rest on a pier and a lighter, the Commission decided they are required to file a tariff stating rates and charges for such services, rather than being free to negotiate rates therefor as they choose.

The Commission further concluded that petitioners should provide in their tariff an appropriately worded agreement to handle a fixed number of tons of lighter cargo within a fixed time or pay a reasonable sum for failure to do so.

Summary of Argument

1. Publication of Petitioners' Lighterage Tariff constitutes an offer to perform services for anyone ready and able to pay for such services.
2. Since Petitioners are willing to perform the services offered in the Lighterage Tariff only when it is expedient or economical for them to do so, they should not make a public offer to perform and state a charge for such performance.
3. Petitioners perform the services described in the Lighterage Tariff only when they can do so without increasing their own costs which costs are fully covered by the compensation paid Petitioners by the ocean carriers for handling the same cargo. Therefore Petitioners would receive a double payment if the Lighterage Tariff were upheld.
4. It is unlawful for Petitioners to unreasonably interrupt or perform work on a particular lighter or otherwise delay that vessel, for their own convenience, thus subjecting some but not all lighter owners to unnecessary expense.
5. Since Petitioners are subject to regulation by the Commission it was properly held that they may not perform certain services for certain classes of lighter owners without charge and other services at negotiated rates.

POINT I

Petitioners act in violation of the law when they reserve the right to determine whether, when and for whom they will render the services described in Lighterage Tariff No. 2.

It is clear from the testimony of petitioners' witness Yates as well as that of their witness Gage, who was considerably less informed than Yates, that the petitioners will not perform, on the request of lightermen or cargo owners, the services of over side transfer of cargo between ship and lighter to which their Lighterage Tariff No. 2 applies exclusively (1a, 3a).* Petitioners therefore are in the position of asking this Court to approve a practice and a tariff in which a party holding a monopoly and offering to render a public service for a price reserves the right to select not only the occasions on which it will render the service but also select the party for whom the service will be rendered without describing in any way the circumstances which will govern that decision. Any such approval by this Court, we submit, would permit petitioners to exercise the rankest kind of discrimination. If the practice be sanctioned, then, without explanation to either lightermen or cargo owners any petitioner could consistently select the lighters of one owner for over-the-side transfer and never render a similar service to lighters of another. Whether the party whose lighters are selected for over-the-side service is being favored or penalized thereby is beside the point. The mere existence of the privilege in favor of the terminal operator is sufficient to condemn the practice. *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, contains in footnotes, beginning at page 490, a comprehensive exposition of the

* References are to Annexed Appendix.

common law on the subject of the obligation of a carrier or other party offering services to the public to render the same services to one and all for the same rates.

The services of these petitioners are akin to those offered by a common carrier in that if the public desires to obtain cargo imported by an ocean carrier served by one of these petitioners, the public must of necessity deal with that petitioner since it was the only party engaged by the ocean carrier to load or unload the ship. Obviously such a party should not be allowed to discriminate between the members of the public for whom it will render a given service.

POINT II

There is ample support in the evidence for the Commission's finding that petitioners are not entitled to the charges stated in Lighterage Tariff No. 2.

Petitioners chief witness Yates testified that certain types of cargo are more economically handled by petitioners by means of the direct transfer between ship and lighter than by transfer to the pier thence lighter. Since Yates admitted that the petitioners alone make the decision whether to handle cargo directly over-the-side between ship and lighter, that fact is self evident even without the Yates testimony.

In addition to the Yates testimony is the evidence of the witnesses for these intervening lightermen who were thoroughly familiar with the terminal operators' work in handling lighter cargo between the ship and a point of rest on the pier and between the ship and the lighter directly without coming to rest on the pier (Cf. Hession; Campion, 10a-15a). These witnesses described the work involved for the terminal operator when for its own reasons, it elects to place the cargo on the pier rather than directly on the lighter. Their testimony shows that the work of

slinging the cargo in the ship's hold is the same whether the cargo goes to the pier or the lighter. However, when the cargo is brought to the pier it is swung by ship's tackle from the ship's hold to a point on the pier directly below the ship's boom where it is removed from the end of the ship's tackle. In order that there will be a clear space on the pier under the ship's tackle to receive the next draft coming from the ship's hold, the first slingload must be moved from the point where the ship's tackle lands it to another place on the pier far enough away from the gangs working the other holds of the ship to avoid interference with them. Generally that movement is performed by mechanized gear (hi-lo's) which must thread its way around the other piles of cargo on the pier until it finds a clear space where this slingload may be stowed. That area must be large enough to store all the cargo covered by one bill of lading. Frequently congested conditions require a slingload to be carried the full length of the pier or even out onto the apron of the pier at the land end thereof. That requires considerable time of the hi-lo operator and unless numerous hi-lo's, operators and checkers are employed, other drafts of cargo coming from the same hold pile up at the ship's tackle until the hi-lo returns to move another draft to the point where the first one was stowed. If drafts being moved from the ship's tackle are not cleared away from the landing point with proper speed no more can leave the ship until that space is clear and the men in the ship's hold who load the drafts on the ship's tackle must stand idle until there is a clear space on the pier for another draft to be landed. Petitioners offered no contradiction of that testimony. The Commission adopted that testimony in their finding concerning costs.

The testimony of the witnesses Hession and Campion also shows that when the cargo is handled directly over-the-side from the ship to the lighter the longest distance normally travelled on the lighter's deck is 45 feet, one-half the length of the lighter's deck, and in any event the

greatest distance is 90 feet, the distance in each instance diminishing as the loading of the lighter progresses. The terminal operator's employees, whether moving the cargo along the lighter's deck by hand or by mechanized gear, are not required to maneuver around piles of other cargo or to pass gangs working in connection with other holds in the ship. They have a clear deck on which to move. Therefore, the cargo is removed from the ship's hold and brought to its place of rest on the lighter's deck in considerably less time than is involved in bringing the cargo to a place of rest on the pier. The lighter serves as an extension of the pier in that the terminal operator may use it for the storage of cargo which would otherwise occupy pier space. Thereby pier congestion is relieved. The period of time during which the terminal operator is responsible for the safety of the cargo is diminished.

The foregoing testimony, we submit shows conclusively that no extra time or expense is involved in handling cargo when the terminal operator for its own reasons, decides that it will place the cargo directly on the lighter's deck. In an effort to overcome the above described testimony of intervenors' witnesses, petitioners offered some general, conclusory statements by the witness Gage whose unfamiliarity with the work involved was demonstrated throughout his cross-examination (2a). Some so-called cost studies were offered (Exhibits 19 & 22) but as the Commission found and as the proof shows they were made during a period when private lighters were not being worked due to a strike of the lightermen's employees and involved only the movement of small quantities of cargo to the railroad lighters. Although received in evidence the Commission gave them no weight (J.A. 71). Petitioners offered some evidence that time was lost in placing lighters and in rigging ship's tackle in position to swing the cargo to the lighters but it later developed from typical contracts with ocean carriers (Exhibit 23) that the latter pay for time lost by the ter-

rninal operator by reason of such delays (Cf. Exhibit 23, Section 2, Items E and G, Section 9).

Additional evidence that the terminal operators do not incur additional costs for direct transfer not paid by the ocean carrier is found in their tariff provision that no charge will be made for similar services performed for railroad lighters (Cf. Lighterage Tariff No. 2, Exhibit 16, page 4). The tariff provision reads:

"There shall be no charge for the loading or unloading of single pieces of cargo weighing 6 tons to 35 tons, inclusive, providing said cargo is received from or destined to a railroad."

It seems quite plain that if direct transfer for a railroad lighter does not involve extra cost it should not involve extra cost for a private lighter.

In the light of all the evidence bearing on the issue of additional costs to petitioners, the Commission rejected the testimony of petitioners' witnesses and accepted the evidence adduced by the opposing parties and found that no extra cost is involved.

Therefore, it is clear that the Commission did not impose upon petitioners the burden of proving that additional costs are involved in over-the-side work and there is nothing in the Commission's decision to so indicate. The Commission held only that those opposed to the petitioners had proven there was no extra cost involved in such work and that the petitioners had failed in their attempt to prove the contrary.

POINT III

The Commission rightly decided and ordered that petitioners are not entitled to charge lightermen for direct transfer of lighter cargo.

Petitioners beg the question when they argue that the Commission did not state the reasons for a conclusion that lightermen should be "relieved of their obligation" to pay the costs of transferring cargo from the ocean ship to its first place of rest, which happens to be on the lighter. The issue is whether there is any obligation on lightermen to make such payment not whether they should be "relieved of that obligation". The report of the Commission gives ample reasons and includes extended discussion as to why no such "obligation" exists. Briefly stated, the reason no such "obligation" rests upon lightermen is because it is the obligation of the terminal operators under their contracts with the ocean carriers to remove the cargo from the hold of the ocean ship and bring it to a place of rest whether that place of rest be on the pier or on the lighter. It is recognized that after the ocean ship's cargo has been removed from the ship's hold and brought to its first place of rest, any additional cost of delivery to ultimate destination must be borne by the cargo whether that cost be trucking charges or lighterage charges. Likewise, it is recognized that the terminal operators or the ocean carriers ordinarily have the right to elect to place the cargo at a place of rest on the pier. When they do so, the cost of removing it from its place of rest on the pier to the lighter must be paid by the cargo through the lighterman who includes it in his charge to the cargo owner. But that cost is not here involved. The only question here involved is whether a terminal operator, which is paid by the ocean carrier for removing the cargo from the ship's hold and bringing it to its first place of rest, is entitled to an additional payment from any other party when, for its own convenience, it elects to substitute the lighter for the pier as the first place of rest.

Petitioners stated in their brief (page 21) that "until this case no one has questioned the obligation of the lighterman to pay the costs of loading and unloading the lighters regardless of the lighter's location". The proof shows that the lightermen have been protesting charges for direct transfer since as far back as intervenors' witnesses could remember. They had no forum from which to obtain an authoritative and binding ruling until the terminal operators came within the jurisdiction of the Federal Maritime Commission. As soon as the petitioners filed their Lighterage Tariff No. 1 these intervenors filed a protest with the Commission and filed another when Lighterage Tariff No. 2 was issued.

Petitioners must be less than sincere in their contention that the Commission's order does not relate to the "receiving, handling, stowing or delivering of property" and that the Commission's order "in no way benefits the shipper or any person having an interest in the cargo". No sensible shipper is going to pay a price for lighterage of its property which includes as one of its factors a charge levied by a terminal operator for delivering the property by loading it on a lighter after the Commission has ruled that such charge is unlawful and after this Court upholds such ruling. Business men bargaining in the market place will see that the lighter rate is reduced by the amount of the eliminated charge and the cargo owner will receive the benefit of the elimination.

Petitioners' argument that lightermen will receive a "windfall" under the Commission's decision and order is likewise unsound for two reasons. Firstly, the cargo owner will insist upon a reduction in the lighterage rate to reflect the elimination of an item of expense heretofore incurred by the lightermen. Secondly, approval of the argument that petitioners should be allowed to continue collection of double charges for the same service because the party ultimately paying such charge will otherwise save money would be tantamount to a holding that extortion should

be permitted to continue because the party who previously submitted to the extortion will save money when the extortion is ended.

The simple fact is that petitioners, because they control the handling of cargo from the ship's hold, are able to force their services and their charges upon the lightermen whenever they desire to do so. As previously pointed out, petitioners' witness Yates freely admitted that when the petitioners make an election to handle cargo over the side they will not allow the lightermen to supply any of the labor involved in receiving that cargo on the lighter's deck.

Petitioners assert that any attempt to change the present method would result in labor conflicts with petitioners' employees. The petitioners chose to be terminal operators and the intervenors chose to be lightermen. If any labor difficulties should result from a change in practices, the burdens created thereby must be borne by someone and petitioners, the employers of the dissident workers, are the logical ones to bear the burden. Moreover, petitioners can eliminate any such problem by discontinuing the practice of direct transfer between ship and lighter since they alone decide when that method is to be used. The petitioners obviously recognize that fact since they state on page 28 of their brief that if they are unsuccessful on the review of this issue "the probability of the lighter being put alongside a vessel approaches zero". If that statement be correct, it prompts the inquiry as to why the Court is burdened with this phase of the review. Obviously the petitioners reap a substantial profit from the practice and are anxious to retain it, otherwise there is no reason for them to be in Court.

On (page 26) of their brief petitioners quote from paragraph 5 of their typical contract with ocean carriers a provision that income from loading and unloading railroad cars, lighters, barges and scows shall be retained by the terminal operator. It is perfectly obvious, we

submit, that the contract paragraph in question relates to the charges which the terminal operators collect for transferring cargo from its place of rest on the pier to the lighter. The desire of the petitioners to keep secret from the ocean carriers the amount collected for that type of work is evident from the exceptions taken by the petitioners to the Commission's ruling that those charges may no longer be privately negotiated but must be stated in a published tariff.

On (page 28) of their brief petitioners, in a footnote, refer to the conclusory testimony of the former conference chairman Mr. Gage that the cost of direct transfer exceeds revenues. It developed during the cross-examination of this witness that he had no firsthand knowledge of the subject (1a-2a).

The imposition on lightermen of charges for direct transfer places them at a distinct competitive disadvantage with truckmen. Cargo destined for truck removal from a pier is brought to rest without charge to the truckman at a point on the pier where the truck may drive up to it for tailboard loading. The truck may arrive whenever its owner pleases within the freetime allowed for delivery. The loading is then done in one operation and the truck may depart within a short time after it backs up to the cargo to be loaded. As opposed to that economical truck operation, direct transfer to lighters involves extensive delay to the lighter. The lighter must await the convenience of the terminal operator before loading commences and is subject to frequent interruptions in the loading, to overtime costs for night operations by the terminal operator, and other expenses as detailed in the testimony of intervenors' witnesses Hession and Campion (4a-9a, 15a-17a).

POINT IV

The Commission rightly decided and ordered that the petitioners must publish tariffs for transferring lighter cargo between the pier and the lighter if they wish to perform that type of work.

Petitioners' entire argument on this point seems to be that Wm. Spencer & Son (which performs some of the work of transferring cargo between the lighter and the place of rest on the pier where the terminal operator places it) is not obliged to publish a tariff for that service. If Spencer is not subject to the Commission's jurisdiction it cannot be forced to publish its rates. If Spencer is subject to its jurisdiction the Commission can and presumably will direct that Spencer do so.

POINT V

The Commission rightly decided and ordered that petitioners must promulgate in their tariff a just and reasonable lighter detention rule.

The Commission recognized the unfairness of the practice under which petitioners delay lighters when the election is made to perform direct transfer. It is described in full in the testimony of witnesses Hession and Campion. (8a-9a, 16a-17a). Petitioners were unable to justify those delays which are so expensive to the lighterman. In their brief (page 36) petitioners try to gloss over their refusal to perform their services without undue delays by referring to a statement made by their witness Gage at the hearing wherein lightermen were urged "to come forward with their detention bills" *against steamships*. That is typical of the petitioners' position throughout this case. Gage had no authority to speak for ocean carriers and the presentation

to him of claims against steamship owners would have been an idle gesture. He refrained from inviting lightermen to come forward with their detention claims against the petitioners.

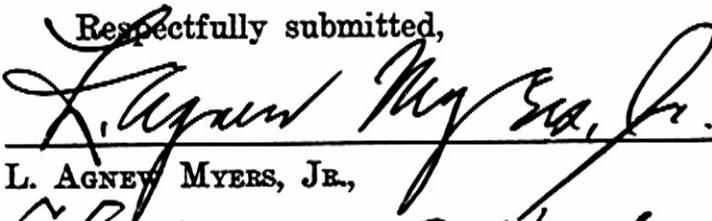
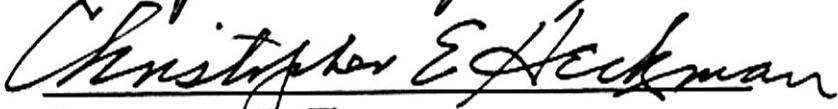
Cutting through all the technicalities which petitioners attempt to inject into the issues, the sole question is whether a terminal operator which elects to transfer cargo directly between a lighter and a ship should not be under an obligation to do so within reasonable working hours and within a reasonable time or pay a detention rate to the lighterman. If the delays be due to weather conditions or other causes beyond the control of the terminal operator no obligation to pay detention will exist but simple justice requires that the terminal operator pay for the delays for which they are responsible.

In connection with this point it is to be noted that the Commission did not direct the petitioners to include a specifically worded provision in their tariff. The Commission directed only that the tariff should contain reasonable provision for recompense for delay. If and when such provision is included in a tariff the question whether the provision is a reasonable and just one will be determined in another proceeding if necessary. Once again the petitioners are completely unable to explain the admitted fact that they pay detention on railroad lighters (3a-4a).

Conclusion

The decision and order of the Federal Maritime Commission is, so far as it relates to lighterage practices, in all respects lawful, just and proper, it is amply supported by the evidence, no errors of law were committed by the Commission in its procedure or in its report and such parts of the order as effect lighters should be affirmed.

Respectfully submitted,


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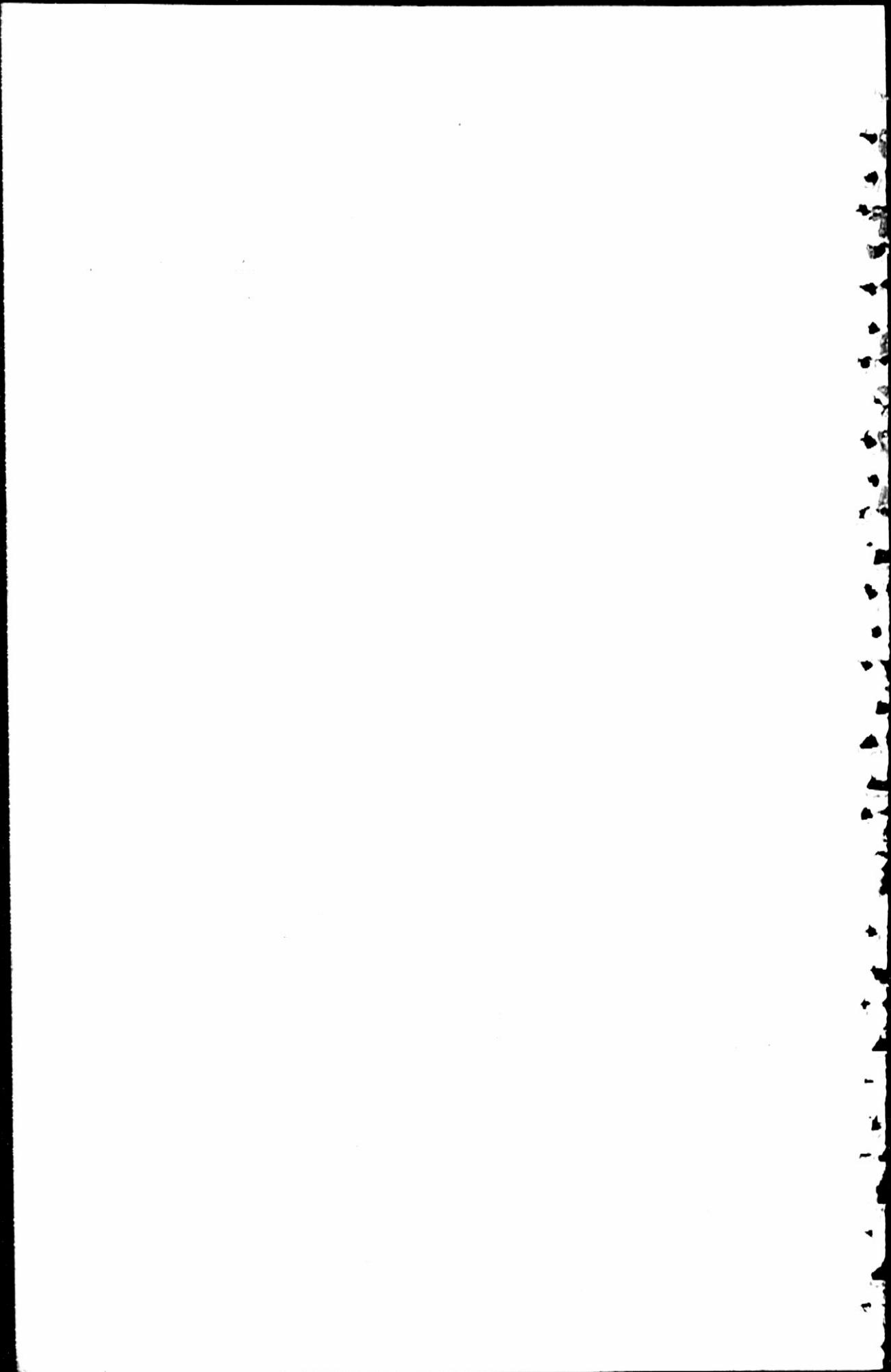
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Washington, D. C.
May 25, 1967



EXCERPTS FROM TESTIMONY AND PROCEEDINGS

112

Richard J. Gage**Cross Examination**

By Mr. Heckman:

Q. May a lighter owner require of a terminal operator that his lighter be loaded or unloaded over-the-side as the case may be? A. It is my understanding that he may not.

Q. Is there anything in this tariff, Exhibit 16, which indicates that a person willing to pay the charge may not have his lighter loaded or unloaded over-the-side? A. In other words, your question is may he, if he requests, insist upon having his lighter loaded over-the-side?

Q. Yes. A. To my knowledge, he may not at this time.

Q. Is there anything in the tariff so indicating? A. I don't believe so.

* * *

116 Q. What is the revenue for working lighters? A. I have it on one of our exhibits.

Q. I believe that's only a half a year. A. From half the terminal operators, yes.

Q. But on page 11 you talk about a total. Do you know the total revenue from over-the-side work? A. No. The only revenue total that I know is contained in Exhibit 18 which is the revenue derived from approximately half of pier operators during the six-month period which, in my opinion, is a good sample and, therefore, quite a valid basis for making such a projection.

* * *

Richard J. Gage—Cross

117 Q. Perhaps I did not make my question clear. You said that this Exhibit 18 represents half of the members of your Conference; is that correct? A. Not half the members—I think it does just about represent half the members—but it represents the members who did approximately half of the truck loading billing during the six-month period.

Q. Did you make any investigation to determine whether it represents the members who did half of the over-the-side work?

118 A. No, only what I said. I asked people if they thought there was a general correlation between the two and the general impressions were yes.

* * *

175 Q. What's your idea of average time involved in discharging 500 tons over-the-side? A. You mean the time of work?

Q. No. A. I told you before, I don't know.

Q. No. The lighterage time at one of your terminals. A. I told you before, I don't know that.

Q. You have no idea? A. No.

Q. Do you know the average time involved to discharge 500 tons to the pier? A. No.

Q. Do you know what the going rate for a scow is per day?

176 A. No.

Q. Do you know how much the scow captain is paid per day? A. No.

Q. Do you know how much the scow captain is paid overtime if his vessel is worked? A. No.

* * *

Douglas Yates—Cross

355

Douglas Yates**Cross Examination****By Mr. Heckman:**

Q. So it comes down to the fact that on and over the side delivery, the lighterman must use your labor and must use your slings. A. Yes, sir.

Q. Now, may the lighterman, on arrival at one of your piers, demand over the side loading or unloading? A. No.

* * *

376 Q. Now it is a fact, is it not, that if a truck arrives before 3 o'clock that truck will be unloaded at straight time? A. That's right.

Q. Even though the unloading may take place after 5 o'clock. A. That's right.

Q. Now if a lighter arrives at 8 o'clock in the morning, is there any set time within which the stevedore will begin to work that lighter's cargo over the side? A. There is no set time, no. He may not work over the side at all.

Q. Well, assuming it is an over the side cargo— A. No, no set time. He will work over the side presumably within the free time period generally allowed on lighters or as early as possible if we can use them.

Q. What do you mean when you say that? A. It varies between—we are talking lighters, railroad lighters.

377 Q. I am talking about private lighters. A. Oh, private lighters we handle as soon as we can.

Q. I didn't ask you that. What do you mean by free time in connection with private lighters? A. We govern ourselves on the basis that a lighter gets two days free time.

Q. What does that mean? A. As a maximum.

Q. What does that mean? A. That means that two working days after he has reported he should be light. If we can do it earlier, we do it.

Vincent J. Campion—Direct

Q. And if you don't do it within two days, what?
A. Well, then we do the best we can.

Q. And if you go four days, do you give the lighterman any recompense? A. No. The railroad lighters, yes. We have a charge, demurrage. Railroad lighters are charged with demurrage and we have an averaging agreement with most of them. The private lighters, we don't have.

Q. Tell us about this treatment on railroad lighters?
A. Railroad lighters, we have free time which is specified, I believe, in the railroad tariffs, not in our tariffs. Railroad published tariffs. They allow two days free time. We have averaging agreements with them where if we can gain time on one we can apply it against another on a thirty day basis.

378 Q. And if you don't unload them within the two days free time, what happens? A. Unless we have credits to apply against them, the steamship companies pays demurrage.

Q. How much? A. I don't know what it is now.

Q. What was it the last you knew? A. The steamship company, they pay it. We don't pay it. I think \$30 a day now. I think \$30 a day, something like that.

* * *

1012

Vincent J. Campion

Direct Examination
By Mr. Heckman:

Q. When the cargo is being worked over-the-side of the ship, are you ever consulted as to whether or not the stevedores will work at straight time or overtime? A. No.

Q. When the stevedores decide that they would work cargo overtime, what effect does that have on your expenses? A. Well, we wind up having to pay the captain

Vincent J. Campion—Direct

of the scow his overtime, and this starts at five. Regardless of whether they start work at eleven o'clock or twelve o'clock or one o'clock in the morning, the captain still gets paid back to five o'clock, and the same applies to our foreman.

In most cases, we have a foreman with the scow captain following a load through so that we have to pay the foreman's time in addition to the scow captain's.

Q. Is that ever reimbursed to you? A. No. At one time we used to be reimbursed part of it; stevedores would honor our invoices. And if I may digress, I can tell you why it stopped or how it stopped, if this is in order.

Q. Please do. A. Some ten or twelve years ago, we were collecting part of this overtime and we had a meeting with the stevedores and terminal operators with regard to these over-the-side charges, and at that time we tried to arrive at some basic rule with regards to the demurrage and night overtime and the wharfage; because of the inconsistency of the demurrage regulations, we wanted to get something in writing where we would be able to point to a shipper and say, "These are the rules in New York."

The same applied to our overtime; we were talking to a shipper and we didn't know whether we were going to have to pay the night overtime or whether we were going to be reimbursed for it or not.

We brought this matter up with the stevedores and terminal operators and at that time it was quite a shock to one of their leaders—I won't mention names—that some of the companies were paying this and from that day forward we never collected another cent.

At a demurrage arrangement or a stated demurrage arrangement, we have run into cases where various steamship companies take different interpretations as to what

Vincent J. Campion—Direct

they should be. The only thing I knew that was in existence was some Maritime Exchange Rules which go back to 1927—I'm not positive of these dates—which were different than Maritime Exchange Rules and these went back to 1922, I think.

But none of these were valid and none up to date and it is quite ridiculous to try to work in this day and age on this sort of thing.

1014 As I say, this is how we stopped being paid for the overtime.

Q. So that your testimony is that in the recent past, no overtime has been reimbursed to you? A. No.

Q. From stevedores or steamship companies. A. No.

Q. I promised that after we were talking about import cargo, we would go to export. Will you state any manner in which export differs from import other than that the procedure is reversed? A. The procedure is slightly reversed. The only difference, of course, is that our shippers tell us when to deliver a barge alongside the ship, and he gives us a date at which this copper is to be delivered and a time.

We deliver the barge to the pier on that particular date, and the operation is reversed. When the steamship company or the stevedores unload the barge, we get a receipt for the tally rather than giving them a receipt. The unloading operation is just the reverse of the loading operation.

Q. The same dimensions apply? A. Yes.

Q. The same operation except in reverse apply? A. That's right.

1015 Q. In the export, is it always necessary that the particular pieces of the commodity be moved by hand or by truck to a point under the sling where they are loading from the scow? A. Does it have to be moved on the scow?

Q. Is it always moved by hand or by truck or are there occasions when they will drag it by the use of the ship's

Vincent J. Campion—Direct

tackle? A. A certain amount of it can be dragged instead of the boom just picking the cargo directly under it. They take the fall and carry it over and make it fast to a draft and drag that draft along on the deck until it is under the boom and then they pull up. Yes, they do this.

Q. With respect to both import and export cargo being handled over-the-side once the loading or unloading of the scow is done, do the stevedores complete it with continuous operation with only dinner recesses or dinner breaks? A. No. This happens sometimes and we have other occasions where they will put 50 or 60 tons on a scow and then they will start and they will go back to work at eleven—

Q. Eleven at night? A. Yes.

And then the next day they may start at two o'clock in the afternoon. We have had it work out various ways. Very rarely is it a continuous operation right through. There usually is a stopoff somewhere.

1016 Q. Why is it that you have a foreman and a scow captain? A. Well, first of all, the scow captain, by tradition and by union agreement and by the man's ability, is not capable of counting a load of copper. The cargo is too valuable and, therefore, we cannot trust the scow captain counting it.

The foreman does all the counting to us and sign them for us. It has become a practice, I think, in our recent union contracts that it states that the scow captain isn't allowed to count a load of cargo, copper.

Some of the oldtimers can count a load of cargo, copper. This is the exception rather than the rule; we do have to have a foreman in most cases.

Q. How about when the stevedores begin to load your scows; does anything have to be done to see that they handle the stresses and strains of loading? A. Oh, yes. This is another reason why the foreman is there and, in some cases, the scow captain can help them a little on this stowage arrangement for the stress of the hook. But

Vincent J. Campion—Direct

the copper also requires certain types of stowage; they want the copper in a particular fashion. And the foreman will make sure this is the way it is stowed rather than have to dump it in any fashion on the boat.

1017 Q. So that so far as the method of loading a scow to prevent damage to it by improper stowage, you supply the man who has the skill in that? A. Oh, yes.

Q. And he directs the longshoremen—

Q. (Continuing) —how to do it to avoid damage to your property; is that so? A. Yes, sir.

Q. It has been said here that the longshoremen are losing their skills in loading scows. Do you suffer deck damages from time to time? A. Yes, we do.

Q. In an effort to minimize that expense, what have you done? A. On all of our scows that are used in the copper transportation work, we have put on wooden deck sheathing over the regular deck. This is a protective coating of lumber to withstand, first of all, the hilos that are used on the scows now and to protect the main deck itself from damage should a hilo strike a bad spot and try to go through it.

This is a protective coating put on this to save the deck as much as we can and prevent damages to the boat itself.

1018 Q. Do you have that on your steel scows? A. Yes, we do. We have wooden sheathing on our steel scows.

Q. Have you had any instances where terminal operators, members of this Conference, have interrupted the loading or unloading of one of your scows for days at a time? A. Yes. We have had occasions where one of our scows was starting to load, the work was knocked off and the ship was taken away from the piers and sent elsewhere.

Q. In the harbor? A. Within the port; to a shipyard and sometimes to a terminal. And then they brought it

Vincent J. Campion—Direct

back again and when they came back they resumed loading our equipment.

Q. Meanwhile your scow was laying at the pier where she had been originally delivered by you to pick up a given quantity? A. Oh, yes. This entails extra expense. Where we are at a pier waiting for the ship to come back, our captain is not only being paid the regular wages but night watching also for staying aboard the boat to prevent theft, and pay a wharfage charge each day that we are waiting for the ship.

Q. When there is no loading, you don't keep your foreman if you know there is not to be loading; is that right?

A. We dispense him until the operation starts again.

1019 Q. But you do keep your scow captain on there for the protection of the cargo? A. That's correct.

Q. When loading is interrupted at night, are you required by the terminal operators to sign a so-called night receipt? A. Yes.

Q. Will you explain that, please? A. If they stop work at five o'clock or eight o'clock or whenever the time may be, the steamship company, for their own protection, have us sign a night receipt for whatever is supposed to be on the scow at that particular time. This is in the event that should a mishap arise during the night and the scow should sink, we have already accepted delivery of that portion of the cargo, which relieves them of the responsibility—at least they think it does; but legally I don't know.

Q. During any protracted interruption in the loading, there is a probability that the responsibility for the cargo is yours even though you had no voice in the question of whether or not the loading was interrupted? A. That's right.

* * *

Vincent J. Campion—Direct

1021 Q. In your opinion, does a stevedore or a terminal operator gain an advantage from handling cargo over-the-side in quantities in excess of 100 tons? A. I would most certainly think so.

Q. What are some of the advantages? A. The first advantage is that there are double handling involved when it goes over the dock directly onto our scow. If it goes to the pier, he might have to move it somewhere on the pier, leave it under ship's hook. Subsequently this entails our moving it again.

Q. I am speaking about the advantage to the stevedore.
1022 A. It relieves the congestion on the pier. I have listened at these sessions for the last week about the terrific congestion on the piers, and certainly if you are going to put cargoes, such as some of our copper shipments, 2000 and 3000 tons on a pier, I don't know what else they are going to get there if they put that kind of tonnage on the pier.

This is going to block the terminal operators' operations; there's no question about that. We are going to have to move that copper a block away in many instances.

This is the principal disadvantage, I'd say, of the congestion to the pier, and in some cases I don't think it would carry the weight; some of the piers.

Q. Do you know for a fact that in many instances, if the cargo were handled to the pier, that the stevedore would have to move it a greater distance than it is moved on your scows? A. Invariably.

* * *

Daniel F. Hession—Direct

1138

Daniel F. Hession

Direct Examination

By Mr. Heckman:

Q. During the course of your presence on piers in connection with your work, have you had occasion to observe the stevedores handling cargo from the same ship to the pier, sir? A. Yes.

Q. That is cargo that you were not interested in? A. That's right.

Q. What has been your observation with respect to the time and work spent by a stevedore in handling cargo over-the-side compared with to the dock? A. I would say the operation over-the-side would be a more efficient operation in that the area where the men are going to work is prepared for them. There is no congestion, obstruction. They work under ideal conditions.

Working inshore through the piers there are a number of operations going on simultaneously and they 1139 contend with pier congestion, while they are unloading a ship.

Perhaps they have to ride the cargo maybe 400 or 500 feet out to the apron of the pier; maybe into an adjacent pier.

Q. What do you mean by the "apron of the Pier"? A. That is the part in front of the area which is on the street; in front of the pier. That is the apron of the pier.

Q. What would be the result if the cargoes over-the-side were placed on the pier along with the result of the cargo from the ship? A. Under the circumstances, it might be physically impossible. If we have, say, 2000 tons of copper in the ship and they try to put that on the pier along with whatever they have already on the pier, outbound cargoes which are assembled on the pier, plus the

Daniel F. Hession—Direct

inbound cargo coming off the shore, they might have to ride the cargo right out onto the apron.

Q. Are we to gather that there are numerous occasions when an inbound ship is being discharged and during the same time there is already on the pier cargo delivered for some other vessel that is later scheduled to come in? A. In some other vessel that is later to come in or for the very same vessel that we are discharging.

Q. How long is it since you have seen cargo stowed below deck on any kind of lighter operated by lightermen in the port?

1140 A. Actually, I am on the New York piers 21 years and I have never seen cargo stowed below the deck.

Q. In the old days, did you hear of lighters which had been built to take some cargo below deck? A. Yes. I have actually seen lighters that did have a small cargo hatch below deck, but I know in the instance of our own fleet back as far as the time I have been there—15 years, 18 years—we have actually had these hatches closed up and the deck built over the hatchway to increase the volume of the deck's space for deck cargo.

Q. On your lighters and your scows, is the cargo carried on an open deck that has no obstruction so far as the cargo space is concerned. A. Yes, that is correct.

Q. And did you hear Mr. Campion's testimony about the distance on which cargo has to be carried when it is being handled to or from a lighter or a deck scow? A. Yes, I did.

Q. Do you agree with that? A. Yes.

Q. One other thing:

Is the over-the-side cargo, of which we are speaking, carried on covered barges to any extent? A. None at all. There are no covered barges to my knowledge being loaded or discharged alongside ships of New York Harbor at the present time.

Daniel F. Hession—Direct

1141 Q. To your knowledge, no cargo from covered barges goes on the dock; is that right? A. That is right, sir.

Q. Captain Yates has testified that his company can handle copper over-the-side just as quickly as to the dock. Has that been your experience in general around the port? A. Yes. I would say perhaps maybe a little more quickly to the scow.

Q. I believe you have testified that you rarely handle cargo of less than 100 ton lots. A. I would say almost never.

Q. But in your experience at the piers, have you seen the railroad lighters coming in with cargoes of less than 100 ton lots? A. Yes. I have seen railroad lighters delivering what would be the equivalent of one carload of 20 tons of cargo to a pier on a scow or a railroad lighter.

Q. Assuming that the stevedore decides that that small lot on a railroad lighter is to be taken over-the-side, and assume there is no other over-the-side cargo for that hold, is there a difference in the time involved in using the offshore rig for a small lot of cargo than there is when a stevedore uses the offshore rig for a scow load of the size that you send?

1142 A. No. There would be no difference in the time.

Q. In other words, the arrangements of booms to handle cargo offshore is the same for a small lot as for a large lot? A. Yes.

Q. But how about the length of time during which the offshore boom is used; is there a difference there? A. Perhaps it might be two or three drafts in a 20-ton lot on the lighter. If we have 500 or 600 tons, they might be working for 24 hour period offshore.

Q. Is it correct that once having rigged the boom offshore to work your vessel, the boom remains rigged that way as long as the stevedore is willing to continue taking the cargo from your vessel? A. That is correct. They don't even do what they call trim the boom in regard

Daniel F. Hession—Direct

to our scow. They will shift the scow back and forth along underneath the ship's hold rather than change the rig; trim the boom to another position.

Q. What is involved in the operation of shifting the position of the scow back and forth alongside of the hold that they are working? A. Letting go perhaps the bow line and taking in on the stern line that leads down from the deck, adjusting the two lines.

1143 Q. On import copper, can that be done while the stevedore's employees on your vessels are waiting for a sling load to come out of the hold? A. Yes. Our foreman and captain usually do that while the work is proceeding. There is no loss of time at all.

Q. Does that also apply when you are delivering cargo for export? A. Yes.

Q. That they position the scows with no loss of time to the stevedores work? A. That is right, sir.

Q. Once a hilo has been swung over to the deck of your scow, is it correct to assume that that hilo remains there and can work for as long as the stevedore wants to continue working your vessel? A. That is right. They can leave the hilo on the deck of the scow overnight as against leaving a hilo on the pier overnight. There is a city law about leaving vehicles that have gasoline in them on the piers as a fire hazard. While they don't have to remove the hilo from the scow.

I might add, that the hilo is not always swung over the deck of the ship. Very often we will accommodate the stevedore who is landing the boat. We will put them alongside the boat for them and then use a crane on the dock to lift the hilo to the deck of the scow; then 1144 we put the scow alongside the ship. This saves them some time.

Q. In other words, you have your delivering tug making two moves in the slip? A. Yes.

Daniel F. Hession—Direct

Q. One to go alongside the dock and let them put the hilo on and your tug waits there. A. Yes.

Q. And then when they have put the hilo on, then your tug will move the scow to a position of wherever hold on the ship the stevedore wants to work. A. That is right.

The same thing, when we are finished working, happens very often at the Grace Line: we will be waiting to tow the minute they are loaded and we will put it alongside and wait for them to lift the hilo off the scow, and then they will tow it away the minute the hilo is off.

Q. Do you make any charge to the steamship company for that? A. No.

Q. Have there been occasions when stevedores have requested you to place a lighter for either export or import at a particular hold or hatch? A. I would say that is standard procedure.

Q. Have there been occasions when they have requested you to not arrive until after the ship has arrived and then go alongside a particular hold?

1145 A. That is right, yes.

Q. Do you make any charge to the stevedore for any overtime towing that you might incur as a result of that? A. No.

Q. Do you do that free accommodation for stevedores who charge you wharfage? A. Yes, we do.

Q. Do any of those stevedores to whom you rendered that accommodating service ever pay the overtime expenses incurred by your company if they choose to work at night?

A. No.

Q. Do they ever consult as to whether or not they will work at night? A. No, they do not.

Q. When the stevedore works at night, do you incur extra expenses? A. Yes, we do. We pay the captain of the boat his time, which continues from five o'clock on until the beginning of the next morning. If the scow has a cargo on it, copper, we have to watch it and his time

Daniel F. Hession—Direct

continues—and under our present agreement, the overtime keeps amounting until it is equal to a day's pay—\$17—so if the boat works, say, two hours, in the evening, they start it at four and put maybe 50 tons of copper aboard the boat, then knock off, say, at five o'clock or six o'clock, we continue to pay the man until the next morning.

1146 Q. Are we to understand from your testimony that for various reasons when there is cargo on a boat, you keep your captain aboard at night? A. That's right, for the security of the cargo.

Q. But when there is no cargo on the boat, you do not keep your captain aboard? A. No, we do not.

Q. And if the stevedores chose to commence work at, say, four in the morning, when would your captain's overtime have started to run, even though the boat at that moment had no cargo on? A. He would have to get straight days pay for the previous day. If you pull him out before midnight, he gets the day's pay. If he does any work after five o'clock, then you go over on the overtime rate and you pick that up from five o'clock to previous day.

Q. So if a stevedore does not begin to put cargo on a boat until one o'clock in the morning, you, nevertheless, have had overtime on your captain from five o'clock the preceding evening? A. Yes.

Q. Plus the man's straight time pay? A. Yes.

Q. What is your practice with respect to counting? Do you have a foreman count or does your captain count? 1147 A. No. As Mr. Campion testified, the scow contract expressly states that a scow man cannot be required to count his cargo, that the only man who could do that would be a foreman or a lighterman. They are more skilled workers, different caliber men?

Q. So when the stevedore chooses to work overtime, you have overtime paid for two men? A. That is right.

Daniel F. Hession—Direct

Q. Have you had damages to the decks of your scows resulting from the manner in which the longshoremen have handled the cargo? A. Yes. Not too frequently lately, because we have gone into the steel boats and we are doing better than when we operated around the piers exclusively with wooden scows.

Q. If you were able to make a reasonable forecast as to when a scow's work at a pier would be completed, would you be able to run your business more efficiently and with less expense? A. Yes, we would. And as a side remark, we have had frequent instances where additional hour's work would get a boat light. We asked the stevedore if he would go from, say, five until six p.m. so that we can get our boat light and dispatch it to another pier, and if the steamship company has not okayed overtime on the steamship, the answer is no, despite our problem.

1148 Q. And then what is it necessary for you to do when a thing like that for one hour's work? A. We would have to go out on the market and charter another scow from another operator if we did not have an additional scow of our own, and then you put the outside scow on a job, and if the job took four days, five days, you would be subjected to that additional expense until the scow got light of the next load that it was carrying.

Q. And then you would have to tow it back from whom you hired it? A. We have to tow it back wherever we had picked it up.

**BRIEF FOR INTERVENING RESPONDENT
MIDDLE ATLANTIC CONFERENCE**

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,286

AMERICAN EXPORT-ISBRANDTSEN LINES, INC., ET AL.,
Petitioners

V

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, ET AL., Respondents

**On Petition for Review of Order of the
Federal Maritime Commission**

REA, CROSS & KNEBEL
917 Munsey Building
1329 E Street, N.W.
Washington, D. C. 20004

May 29, 1967

STATEMENT OF QUESTIONS PRESENTED

In the opinion of Intervening Respondent, the questions are:

I

In an investigation under Sections 15, 16 and 17 of the Shipping Act of 1916 into the rules, regulations and practices of common carriers by water and other persons subject to the Act carrying on the business of furnishing terminal facilities in connection with a common carrier by water, did the Federal Maritime Commission exceed its authority, or act arbitrarily or without substantial evidence, in directing the establishment of rules and regulations governing the detention of motor carrier equipment in connection with the receiving and delivering of property at said facilities, upon finding that the existing regulations and practices are unjust and unreasonable under Section 17 and unduly prejudicial under Section 16?

II

In so acting did the Commission prejudice the rights of Petitioners by failing to observe any procedure required by law?

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BRIEF FOR INTERVENING RESPONDENT
MIDDLE ATLANTIC CONFERENCE

—
COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the Federal Maritime Commission entered in Docket No. 1153 on May 16, 1966. The proceeding in Docket No. 1153 was instituted by order of the Commission dated October 10, 1963 directing an investigation and hearing into truck and lighter loading and unloading practices at New York Harbor. Named as respondents to the investigation were the New York Terminal Conference and each of its individual members who, under Agreement No. 8005, as amended, approved by the Federal Maritime Commission under Section 15 of the Shipping

Act of 1916, 46 U.S.C. § 814, collectively establish the rates, charges, classifications, rules, regulations and practices covering services of loading and unloading of water-borne freight onto and from trucks, lighters and barges. Pursuant to this Agreement, Petitioners had published, by filing with the Commission, New York Terminal Conference Tariffs No. 2 and No. 6 applicable to loading and unloading and related activities performed in connection with lighter and motor carrier traffic, respectively. Stated generally, the purpose of the investigation was to determine whether Agreement No. S005, and Petitioners' activities thereunder, were in compliance with Section 15 of the Shipping Act, and whether any of Petitioners' rates, rules, regulations or practices were in violation of the provisions of Sections 15, 16 or 17 of that Act, 46 U.S.C. §§ 814, 815, 816.

A hearing was convened before Examiner A. L. Jordan in New York City on March 9, 1964 and concluded on April 9, 1964. Following the filing of briefs, the Examiner on July 15, 1965 issued an initial decision finding Petitioners in violation of the Act in several respects. Petitioners excepted to the Examiner's decision, and, on May 16, 1966, the Federal Maritime Commission issued the Report and Order here assailed. The Commission found, *inter alia*, that Petitioners were in violation of Section 17 of the Shipping Act by providing in their tariffs for a charge on the direct transfer of cargo between an ocean vessel and a truck or lighter; that Petitioners were in violation of Section 16 First and Section 17 by failing to prescribe in their tariffs detention rules providing for the payment of a reasonable charge for the undue delay of lighters and trucks; that Item 10 in Petitioners' tariff, the so-called three o'clock rule, which guaranteed servicing of trucks in line at 3:00 p.m. only if unloaded by the pier operator, was unreasonable under Section 17 of the Act; and that Petitioners' failure to include in their lighterage tariff a provision for the assessment of charges against lighters loaded or unloaded

from or to the piers as opposed to those loaded directly over the side of the ocean-going vessel was a violation of Section 17 of the Act. Relating to its findings respecting truck detention, the Commission further found that a provision in Petitioners' Tariff No. 6, purporting to immunize Petitioners from the payment of detention charges to motor carriers, was discriminatory to motor carrier traffic and resulted in an undue preference to lighter traffic in that Tariff No. 2, applicable to the latter, contained no such immunizing provision but specifically permitted the collection of such charges.

On June 28, 1966, Petitioners filed their petition to review the Commission's order of May 16, 1966, invoking the jurisdiction of this Court under the Review Act of 1950, 5 U.S.C. § 1031 *et seq.*, as re-enacted by P.L. 89-554, 28 U.S.C. § 2341 *et seq.* By order entered August 15, 1966 the Court permitted Middle Atlantic Conference (MAC), among others, to intervene in support of the Commission.

Middle Atlantic Conference is a non-profit membership corporation consisting of some 1,300 carriers certificated by the Interstate Commerce Commission to engage in the common carriage of property by motor vehicle in interstate and foreign commerce in and between the Dominion of Canada, the District of Columbia and 15 states located in New England and the northeastern United States. Under an agreement approved by the Interstate Commerce Commission pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, MAC is the agency through which its members collectively discharge their duties under Sections 216 and 217 of the Interstate Commerce Act, 49 U.S.C. §§ 316, 317, to establish, publish, and file just, reasonable, non-discriminatory and otherwise lawful rates. To this end, Middle Atlantic Conference publishes and files with the Interstate Commerce Commission rates and charges for the transportation of property, and rules, regulations and practices relating thereto, and participates

before that Commission, other Federal and State regulatory bodies, and the courts in proceedings involving the lawfulness of these rates, charges, rules, regulations and practices, and the rates, charges, rules, regulations and practices of other carriers, modes of carriage, and other persons rendering services competing with or otherwise affecting the services of its members.

A substantial number of MAC's members are regularly engaged in the transportation of property in interstate and foreign commerce to and from the piers at the Port of New York. These carriers are directly affected by, and have a vital interest in the rates, regulations, practices and conditions governing the interchange of property between them and water carriers serving that Port. For this reason MAC intervened before the Federal Maritime Commission in Docket No. 1153, and actively participated at each stage of the proceeding leading to the adoption of the assailed Report and Order of May 16, 1966. MAC's interest before this Court is in defending the portions of the Report and Order relating to truck loading and unloading practices, particularly to the Commission's findings and conclusions pertaining to truck detention. Accordingly, this brief will be addressed to that issue, and to the various allegations of procedural error raised by Petitioners.

SUMMARY OF ARGUMENT

I.

Under the Shipping Act of 1916, the Federal Maritime Commission is empowered to regulate the practices of carriers and other persons subject to the Act connected with or relating to the handling of property. This necessarily encompasses authority to regulate all practices involving the interchange of property at piers and terminals, including the transfer of property between ocean and motor carriers. The Commission may exercise this power to require Petitioners to adopt tariff provisions designed to reduce

the delay of motor carrier equipment at the piers, including a requirement for the payment of a reasonable detention charge. In doing so here, the Commission made adequate findings based on substantial evidence following a complete investigation in conformity with the Administrative Procedure Act.

II.

Petitioners have failed to establish that any procedural errors were committed by the Commission violative of their right to due process. Section 5(c) of the Administrative Procedure Act is not applicable to the type of proceeding here involved, and assuming, *arguendo*, that it is, Petitioners have made no showing that any actions of the Commission, its Examiner or its employees were in violation of fundamental procedural rights, or that Petitioners were prejudiced in any way.

ARGUMENT

The Commission's Findings and Conclusions on Truck Detention Are Lawful

Petitioners candidly admit that they have "no disagreement [with the Commission's finding] that truck congestion and delay at piers on the New York waterfront is a serious problem".* Nor do they take issue with the Commission's findings respecting the impact of this problem, namely, that the resulting inefficient use of equipment and labor of the motor carriers tends to increase their operating costs, affects their ability to compete with other modes of transportation, and imposes a burden on shippers and receivers of export and import traffic in that these in-

* Page references to quotations from Petitioners' Opening Brief are omitted for the reason that, under the Court approved stipulation governing procedures on this appeal, the printed briefs of all parties are being filed simultaneously. Hence, Petitioners' printed brief was unavailable at the time Middle Atlantic Conference's brief was submitted to the printer.

creased costs of the motor carriers are necessarily passed on by them in the form of higher rates. (J.A. 66) Conceding all this, Petitioners nevertheless ask this Court to nullify the Commission's efforts to deal with this substantial evil affecting the interchange of import-export cargo at the New York piers.

Petitioners say that the Commission has no authority under Section 17 of the Act to require them to adopt uniform tariff provisions regulating the detention of motor vehicles at the piers. While not entirely clear, the thrust of their argument seems to be that, while Section 17 requires Petitioners to "establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property", truck detention is not a levy against the cargo or "property", but is a payment to the truck. They contend that, since the truck has a fixed tariff rate for carriage of cargo irrespective of delay at the piers, the payment of truck detention would not in any way enure to the cargo.

The short answer to this argument is that it misconceives the very nature and functions of a detention or demurrage rule. These charges have nothing to do with transportation rates. They are no part of, and are separate and distinct from the charges for transportation, or services incidental to the transportation, of property which are assessed against the cargo and payable by the shipper responsible therefor. *Berwind-White Coal Min. Co. v. Chicago & Erie R.R.*, 235 U.S. 371. Hence, while they may follow the shipment and be collected together with the transportation charges, as a distinct and separate charge they may also be collectible from one other than the shipper responsible for the transportation rates. *Krauss Brothers Lumber Company v. Director General*, 92 I.C.C. 450; *Manassas Timber Company v. L. & N. R.R. Co.*, 115 I.C.C. 421, at 425.

It is well settled that the primary purpose of a detention or demurrage charge is not to compensate for services rendered by a carrier, but "to eliminate the abuse of excessive and unreasonable detention" of the carrier's equipment. *American Wholesale Lumber Association v. Director General*, 66 I.C.C. 393, 396, 397 (1922). A demurrage or detention charge consists of two elements, namely, compensation for use of the equipment, and a penalty designed to prevent the undue detention of equipment. While the charge is in the nature of a penalty, it is entirely lawful so long as its purpose is to secure to the shipping public a more efficient use of carrier equipment. *Turner, Dennis and Lowry Lumber Company v. Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, affirming 2 F.2d 291 (1924). And, of course, to be effective as a penalty, the charge must be payable or ultimately borne by the one having control over the delay, or one to whom the delay is attributable.

Petitioners are in error when they say that the truck has a fixed tariff rate for the carriage of cargo irrespective of delay at the piers. Pointing to a proceeding before the Interstate Commerce Commission in *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 318 I.C.C. 593 (1962), Petitioners say that that Commission there "refused to allow truckers to provide for detention at terminals in their truck tariff". This is incomplete and incorrect. That proceeding was an investigation instituted by the Interstate Commerce Commission at the request of MAC into the charges for detention of motor vehicles incident to the loading and unloading of trucks and the rules, regulations and practices in connection therewith of all motor common carriers operating in Middle Atlantic Territory. MAC proposed a uniform detention rule for prescription by the Commission to eliminate a chaotic situation then existing within Middle Atlantic Territory under which a great number of motor carriers operated within the territory under numerous detention rules varying significantly in their terms and requirements. The Interstate

Commerce Commission approved MAC's proposed rule in most respects. However, the Commission ordered the rule to be amended to delete the definition of "consignor" and "consignee" under which the Rule purported to specify the person actually responsible for detention, and liable for the charges. See 318 I.C.C. 593 (1962).

On August 19, 1962, the Interstate Commerce Commission vacated and set aside this report, and reopened the investigation for further hearing. On April 23, 1965 the Commission issued a report and order on further hearing, 325 I.C.C. 336. In this later report the Commission approved for prescription throughout Middle Atlantic Territory a uniform detention rule which is applicable when motor carrier vehicles are delayed or detained at premises of the shipper, or at places designated by the shipper. Petitioners were parties to that proceeding, and there, as here, contended that it was improper for a detention rule to be applicable to pier locations. The Interstate Commerce Commission dismissed this contention, holding that the "efficient and economic operation of vehicles is the objective no less when the interchange is of water-borne traffic as when it is of other traffic." 325 I.C.C. at 340. Contrary to Petitioners contention, the Commission specifically refused to restrict MAC's detention rule to exclude its applicability to the detention of vehicles at the New York piers.

Under the detention rule of Middle Atlantic Conference its motor carrier members are required to collect detention charges where equipment is detained beyond the free time provided in the rule. MAC's rule does not in terms designate those liable for payment, but it plainly contemplates the assessment and collection against those responsible for the equipment delay. Because of Petitioners' unlawful maintenance in their truck loading and unloading Tariff No. 6 of Item 16 by which they have immunized the steamship companies and others operating piers at New York Harbor from the payment of MAC's detention

charges, the motor carriers have been unable to collect them. Their only recourse is to seek to collect the charges from the shipper liable for the motor carriers' transportation charges. But, as we have seen, detention charges bear no relationship to transportation charges, and since the shipper has no control or responsibility whatever over the delay of equipment at the piers, the shipper understandably refuses to pay such charges. As a result, the substantial expense incurred in delays at the pier necessarily find their way into higher rates and charges for motor carrier service at the piers. This increased cost to the shipper was one of the very reasons why the Commission here found that Petitioners are liable for detention charges. Not only will it tend to reduce the delay of equipment now experienced at the piers, but, as the Commission found and Petitioners concede, it will thus reduce the costs to the motor carrier and ultimately to the shipper which are directly attributable to such delays.

Petitioners say that the Commission's order is arbitrary. Specifically, they contend that the Commission's order directing them to prescribe a truck detention rule is inconsistent with the Commission's statement at page 12 of its order (J.A. 74) to the effect that because of the many and varied factors which may or do contribute toward a particular instance of delay, it is virtually impossible to determine responsibility for truck delay. There is nothing inconsistent between this statement and the Commission's determination that Petitioners must pay reasonable detention charges. The Commission is not saying, as Petitioners would have it, that the cause of delay cannot be ascertained in a particular instance. The Commission is merely recognizing, as the record shows, that delays are attributable to many factors which, unlike lighter delays, cannot be isolated and attributable to any single cause. Moreover, this argument again misconceives the nature and function of a detention charge. The necessity and practicability of a detention rule need not and does not de-

pend on the isolation of the cause of delay in a particular instance. The rule presumes delays, and further presumes that they will be caused by many factors, many of which cannot be anticipated. It is for this reason that a detention rule must place on the one under whose control the delay occurs, the onus of accounting for the delay of equipment. This is not to say that a detention rule may not provide for the exoneration of liability where the delay is beyond his control, for example, where strikes, weather conditions, or acts of God intervene as a cause of the delay. Thus, it is not uncommon for a demurrage rule to provide for relief from charges for a certain period following a severe storm, while requiring the assessment of charges following that period where the inability to unload and release the equipment is thereafter for reasons peculiar to the business of the one detaining the equipment. See for example *Federal Chemical Company v. New York Central Railroad Company*, 308 I.C.C. 386.

Petitioners' remaining arguments are specious. They make the contention that the Commission's order as it relates to motor vehicle detention violates the rule making provisions of the Administrative Procedure Act, 5 U.S.C. § 553, in that no notice of proposed rule making was given. Here, of course, the Commission prescribed no rule, but merely held that the failure of Petitioners to prescribe one was a violation of the Shipping Act. Petitioners themselves necessarily recognize this by complaining that the Commission's order is vague and ambiguous because it does not spell out the specific terms and conditions of a detention rule. Had the Commission done so, the Petitioners' argument on the rule making violation would perhaps be well taken. Having found that the absence of a truck detention rule in Petitioners' tariff violated the Act, the Commission, had it determined to prescribe a rule, might well have been required to institute a rule making proceeding looking to its prescription. It did not do this but adopted the only alternative available to it, that is, it permitted Petitioners to prescribe their own rule in the first instance. This

is all that the Commission was required to do. And we are at a loss to understand how this is violative of Petitioners' rights.

Finally, Petitioners claim that the Commission improperly ignored a truck appointment provision which Petitioners inserted in a superseding Truck Tariff No. 7, which was filed with the Commission before its decision but after the Examiner's decision. Here again, this argument is inconsistent with Petitioners' other contentions. Whether or not the truck appointment provision in Tariff No. 7, or any other provision Petitioners might adopt, is just and reasonable, and in compliance with the Commission's order, was not a proper subject of this investigation, but is a question which must be answered in a rule making proceeding instituted upon proper notice.

**No Rights of Petitioners to Procedural Due Process
Have Been Violated**

By order entered October 31, 1966, the Court has deferred, pending the hearing of this case on its merits, a ruling on Petitioners' motion to adduce additional evidence in support of various allegations concerning violations of Section 554(d) of the Administrative Procedure Act, 5 U.S.C. § 554(d). In their brief, Petitioners have renewed this motion, and, in support thereof, have advanced substantially the same arguments previously made in the motion itself.

Petitioners make three allegations respecting procedural violations. They say: first, that staff members, who engaged in the investigation participated, and advised the Commission respecting its decision; second, that the hearing examiner was improperly under the supervision and direction of staff members having investigatory responsibility; and third, that certain staff members made improper *ex parte* communications to the Commission.*

* Significantly, Petitioners have not renewed, and, hence, have apparently abandoned, the contention in their motion that the Examiner engaged in improper *ex parte* communications.

Petitioners support the first allegation with extracts from the minutes of certain meetings of the Federal Maritime Commission at which the Commission instituted this proceeding, and thereafter voted to issue the report and order here under review. By letter of July 29, 1966 from the Commission's Secretary to Petitioners' counsel transmitting these extracts, the Secretary lists as among those present at these meetings various personnel of the Commission's staff, such as the General Counsel, employees of the Office of Foreign Relations, the Secretary, and Special Assistants to the Commissioners. (J.A. 179) The substance of Petitioners' contention is that the presence of such personnel at these meetings is a violation of Section 554(d) of the Administrative Procedure Act. This totally ignores the plain language of that section which provides in part that:

"This subsection does not apply—

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency."

Section 554(d) is thus not applicable here, first, because the Federal Maritime Commission, as a body, and each member, thereof does not come within its proscriptions, and, secondly, because the proceeding before the Commission here was a rule making proceeding instituted to determine the validity of Petitioners' practices in rendering common carrier terminal services at the Port of New York, and, hence, was the type of proceeding specifically excluded from the requirements of Section 554(d).*

* Petitioners' argument that the above quoted exclusion of Section 554(d) is not applicable because they are not public utilities or carriers is not persuasive. Some of Petitioners are steamship companies and, hence, common carriers. Others are pier operators conducting terminal operations under

Assuming, *arguendo*, the attendance of the Commission's staff personnel at its meetings was somehow improper, Petitioners fail to show that such personnel actually participated in the decision, or how their presence was otherwise prejudicial to them. A reading of the extract of the May 12, 1966 Minutes of the Commission shows on its face that the sole purpose of that meeting was not to deliberate on and decide the issues in this proceeding, but to approve the issuance of the report and order already prepared in accordance with the prior direction of the Commission. (J.A. 181). Moreover, even if the Commission's staff had participated in the drafting of the report and order, no right of due process would have been denied Petitioners. As the Court of Appeals for the Ninth Circuit, in *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676 (1949), stated in answer to a similar contention with respect to the preparation of portions of findings and conclusions of the Federal Security Administrator (174 F. 2d at 694):

"... there is no constitutional prohibition against the findings and conclusions being drawn by the successful party at the direction or with the permission of either a trial judge or administrative hearing officer. To so declare would cause unjustifiable opprobrium upon the trial bench of both the Federal and State judiciary. In judicial proceedings, the separation of judge and litigant necessary for a minimum of fairness is in that portion of the decisional process involved in *actually making the decision*. It cannot be contended that mere drawing of the findings is participation in the actual decision. The requirement of Section 5(c) [of the Administrative Procedure Act] of separation of functions in adjudications arose as the result of extensive public criticism of the fairness of hearings in which the trier of fact and the investigative and prosecut-

contract with steamship companies, and, thus, are fulfilling as agents their common carrier duty to maintain terminals for the receipt and delivery of cargo. Since Section 17 of the Shipping Act specifically regulates such terminals, Petitioners clearly come within the meaning of the Section 554(d) exclusion.

ing officials were members of the same agency and often exchanged duties." (Emphasis the Court's, footnotes omitted).

Significantly, nowhere do Petitioners allege that the Commission's personnel actually participated in the decision of this case. Nor do they explain how their mere presence at the meeting at which the Commission's Report was approved for issuance is unfair to them.

Amos Treat & Co., Inc. v. S.E.C., 306 F. 2d 260, 113 App. D.C. 100 (1962) and *Columbia Research Corp. v. Schaffer*, 256 F. 2d 677 (C.A. 2, 1958) strongly relied upon by Petitioners are inapposite. The *Amos Treat* Case involved the question as to whether a member of the Securities and Exchange Commission, who was the Director of the Commission's division which investigated and recommended the institution of a proceeding, could thereafter participate in the Commission's deliberations and final decision in that proceeding where he had, in the interim, been appointed as a member of the Commission. In the *Schaffer* Case the question under the Administrative Procedure Act was whether an assistant counsel in the agency's general counsel office could make the final decision on a matter which had been raised in a complaint prepared by his superior, the general counsel. Judge Learned Hand's conclusion that the subordinate's passing upon the success of what his superior had undertaken violated Section 554(d) was obviously correct. But this holding has no bearing on the propriety of the Commission's action here, where, as the superior, it has passed on the investigatory undertaking of its employees, an act which is a commonplace procedure in administrative proceedings.

Petitioners have cited only one instance in which a communication was made between the Commission and its staff. The communication they cite, the memorandum of April 7, 1964, was in connection with the Examiner's issuance of a subpoena, and was before the Commission on

Petitioners own appeal from the Examiner's action. (J.A. 169) The Commission was faced with the determination of whether to seek enforcement of the subpoena. Thus, the Commission's reliance on its staff was entirely proper, indeed necessary, to carry out the Commission's enforcement obligation under the Shipping Act.

Finally, Petitioners argue that the proceeding below was tainted because the examiner who heard the case was under the control of the Commission's Managing Director. In support of this they point to Amendment 6 to Commission Order No. 1 issued February 28, 1964 (29 F.R. 4285, March 18, 1964), which, under Section 3.02 thereof, purported to place the Commission's hearing examiners under the supervisory control of the Commission's Managing Director. As Petitioners point out, this action of the Commission was immediately criticized on the ground that it was inconsistent with Section 554(d) of the Administrative Procedure Act. Indeed, the objection of the Maritime Administrative Bar Association, by its president's letter dated March 31, on which Petitioners rely, was made a mere 13 days after the provision was promulgated in the Federal Register. As Petitioners themselves show, as a result of this and similar criticisms, the provision was immediately rescinded by the Commission by an order which appeared in the Federal Register May 13, 1964 (29 F.R. 6290). Thus the offending portions of Section 3.02 were only briefly in effect, were adopted well after the hearings in this proceeding commenced, and were rescinded soon after the hearings concluded and long before the examiner issued his recommended decision in this proceeding.*

Petitioners neither show nor contend that Section 3.02 ever became operative in fact. Indeed, in view of the

* Petitioners quote at length from a memorandum of the Commission's Chief Hearing Examiner, dated April 9, 1964, strenuously objecting to Amendment 6. If anything, it shows that the Commission's Examiners strongly resisted supervision and direction by the Managing Director at the very time Petitioners imply that they were being improperly supervised.

hasty criticisms that were made, and the prompt rescission of the provisions of Section 3.02 relating to hearing examiners, it is clear that the Managing Director had neither the time nor the opportunity to exercise any control over the hearing examiner in this proceeding. In any event, Petitioners do not allege, much less show, that any improper control was actually exercised, but rely solely upon the shortlived existence of the ill fated Amendment No. 6. This Court is entitled to something more specific and convincing on which to weigh the extraordinary relief asked by Petitioners.

In seeking to adduce unidentified evidence *de novo* before this court, Petitioners rely upon Section 7(c) of the Review Act of 1950 (the Hobbs Act), 72 Stat. 951, 5 U.S.C. § 1037. Besides requiring a showing of materiality which, in and of itself, requires a showing of specific evidence to be adduced (a showing which Petitioners have wholly failed to make here), Section 7(c) requires that reasonable grounds be established for failure to adduce the evidence before the agency. Petitioners have completely ignored this statutory requirement. Petitioners were first placed on notice as to the allegation concerning improper control, by the promulgation of Amendment 6 to Commission order No. 1 on February 28, 1964, a date prior to the commencement of hearings in this case. They were again placed on notice on March 31, 1964, when the objections of the Maritime Administration Bar Association were submitted to the Commission. Petitioners, having had knowledge of the "questionable" procedures adopted by the Commission, nevertheless failed to timely object in this proceeding when they could have done so before, or while the hearing was in progress. Equally unexplained is Petitioners' delay in raising the allegation of *ex parte* communications. According to Petitioners' motion, the basis for this allegation first came to light in the District Court proceedings in connection with the subpoena enforcement. Yet these court proceedings took place well before the adoption by the

Commission of its final decision in this case on May 16, 1966. It is fundamental that allegations of error cannot be raised on judicial review of an administrative order where the allegations could have been, but were not, advanced and preserved by the party in the administrative proceeding itself. Here Petitioners had actual knowledge and ample opportunity to raise the various allegations, it now urges before this court, in the proceeding before the Federal Maritime Commission. As this court stated, in favorably quoting the Civil Aeronautics Board, in *North American Airlines v. C.A.B.*, 240 F. 2d 867, at 874:

"We think it is perfectly plain that respondents are not entitled to sit back until Board decision is imminent and at their convenience come forth with a claim for disqualification of a Board member based upon alleged facts within respondents knowledge long prior to consideration of this case by the Board."

CONCLUSION

For the foregoing reasons, Middle Atlantic Conference submits that the Commission's Report and Order of May 16, 1966 must be affirmed.

Respectfully submitted,

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